In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1437

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, PETITIONER,

v.

CARRIER AIR CONDITIONING COMPANY

AND

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SOL BOGEN,
Attorney for Petitioner,
One Pennsylvania Plaza
New York, New York 10001

I N D E X

CITATIONS

Cases:

Statutes:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Petitioner,

v.

CARRIER AIR CONDITIONING COMPANY

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sheet Metal Workers' International Association, Local 28, AFL-CIO, petitions for a writ of certiorari to review the judgment of the United States

Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp. 2a-30a) is reported at 547 F.2d 1178. The decision and order of the National Labor Relations Board (App. B, infra, pp. 31a-44a) is reported at 222 NLRB 727.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Whether when the National Labor Relations Board has found that a union has not engaged in an unlawful secondary boycott because the union has not engaged in any unlawful conduct within the meaning of either subdivision (i) or (ii) of Section 8(b)(4)(B) of the National Labor Relations Act and has therefore expressly found it unnecessary to make findings on whether the object of the Union's conduct was secondary and unlawful, the court of appeals, upon

disagreeing with the Board on the lawfulness of the union's conduct, is required to remand to the Board for findings with respect to the lawfulness of the Union's object.

II.

Whether when an employer and a union enter into a collective bargaining agreement containing a "work preservation" clause and thereafter the employer enters into a business contract which requires him to violate that clause, a union violates Section 8(b)(4)(ii)(B) or Section 8(e) of the National Labor Relations Act when it files a grievance against the employer under the collective bargaining agreement in which it seeks only to hold the employer liable for the wages lost by employees as a consequence of the employer's breach of the collective bargaining agreement.

STATUTES INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b) provides, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in his clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Section 8(e) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(e), provides in relevant part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

* * *

STATEMENT OF THE CASE

A. The Board's Findings of Fact

Background

Sheet Metal Workers' International Association, Local 28, AFL-CIO ("Union") was party to a collective bargaining agreement with Sheet Metal and Air Conditioning Contractors National Associates, New York Chapter, Inc. ("SMACCNA") which contained a clause providing that certain enumerated work, including the manufacture, fabrication and installation of "plenums," shall be performed by sheet metal workers in the bargaining unit.[1] The collective bargaining

1. The clause is set forth in full in the Board's decision (App. B, infra, p. 34a).

agreement set forth remedies for violations of the agreement including the imposition of fines commensurate with the loss sustained by sheet metal workers.

A plenum is a four-sided sheet metal box which serves for the housing or receipt of air and noise abatement. In the New York area, the Union's members have traditionally fabricated and installed plenums on conventional air-conditioning units (App. B, infra, p. 35a).

At issue here are the plenums in moduline air-conditioning units manufactured by Carrier Air Conditioning Company ("Carrier"). Carrier began marketing its first moduline unit, Model 37P, in the New York metropolitan area in 1966. Later improvements led to the manufacture of Model 37A around 1970. Both of these units included plenums that were prefabricated and attached at Carrier's Tyler, Texas plant. Although numerous parts of each unit were patented, the plenum was not (id. at 35a). Commencing with Carrier's efforts in 1966 to market its moduline units in New York with prefabricated plenums attached, and continuing through the events in controversy in 1973-74, the Union insisted that the work of fabricating and installing the plenums was work that belonged to members of the New York bargaining unit.

The Alleged Violations

On June 5, 1973, the Union's executive board adopted a resolution that "no allowance be made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area" (id. at 37a). This resolution was presented to and adopted by the general membership on June 21, 1973.

In early 1973, plans were prepared for the construction of the Van Etten Drug Treatment Center. The mechanical specifications called for the use of "variable volume linear air diffusers, Carrier Moduline or approved equal" (id. at 37a). The heating, ventilation, and air-conditioning contractor on the project, Acme Climate Control Corp., issued a purchase order for the Carrier 37A units pursuant to the specification and subcontracted certain sheet metal work, including the installation of the Carrier 37A units on the project, to Three Boro Sheet Metal and Ventilating Co., Inc. ("Three Boro"), who was by a separate agreement bound to the terms of the collective bargaining contract between the Union and SMACCNA.

On October 18, 1973, an erasure of the

Carrier Moduline units from the drawings of the Van Etten job was discovered. There was testimony that a sketcher employed by Three Boro and a member of the Union has erased the Carrier units from the drawings (id. at 38a). There was also testimony concerning a telephone conversation between Carrier and Union representatives concerning these events (ibid.). Based on these incidents, Carrier filed an unfair labor practice charge on October 25, 1973 alleging a violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158(b)(4)(i) and (ii)(B) (the "Act").

On November 13, 1973, Carrier spokesmen met with the Union's officials at which time the Union's President told the Carrier representatives that "he could not permit the unit to come in [to New York]" (id. at 39a). On December 27, 1973, Carrier filed a charge based on this conversation alleging a violation of Section 8(e) of the Act, 29 U.S.C. 158(e). However, the parties continued to attempt to resolve the dispute and the Union permitted Three Boro to install the Carrier units on the Van Etten job without further incident.

In January, 1974, Columbia Presbyterian Hospital entered into an agreement with H. Cohan

Contracting Corporation ("Cohan") to perform all the mechanical work on its Babies Hospital Addition in accordance with the building specifications prepared by architects and consulting engineers. The specifications called for the installation of Carrier's 37AF air terminal units, including plenums as fabricated by Carrier (id. at 39a). Cohan thereafter subcontracted certain sheet metal work on the project, including installation of the Carrier moduline units as specified, to General Sheet Metal, Inc. ("General"), a member of SMACCNA.

Meanwhile, in March, 1974, the President of the Union and Carrier tentatively agreed that the Union would accept Carrier's moduline units as factory fabricated in consideration for which Carrier would withdraw the instant unfair labor practice charges and promote the moduline units so as to provide additional sheet metal work. Effectuation of the tentative understanding was deferred due to a union election in which the President was unseated. On July 19, 1974, Carrier met with the newly elected Union President to discuss the proposed resolution at which time Carrier was told that the Union had decided to "insist that [Carrier] go along with the agreement as written" (id. at 39a).

The Union filed a grievance against General

under the SMACCNA agreement on November 7, 1974. It requested a hearing and determination of the Joint Adjustment Board ("JAB"), a body consisting of an equal number of representatives of the Union and of SMACCNA, established by the collective bargaining agreement for the purpose of resolving grievances arising out of the interpretation or enforcement of the contract (id. at 40a).

The Union proposed that General pay the sum of $2,153.60 to the Local 28 Sick Dues Relief Fund, which sum represented the loss of man hours caused by General's alleged violation (ibid.). Upon filing of this claim, General ceased the installation of the Carrier units at the Babies Hospital site. The work was, however, resumed when Carrier agreed to reimburse General for the amount claimed by the Union, thus obviating the necessity of a determination by the JAB.

The unfair labor practice complaint, as amended, alleged that by filing the grievance against General, the Union violated Sections 8(b)(4)(ii)(B) and 8(e) of the Act.

B. The Board's Decision

On these facts the Board found no violations of either Sections 8(b)(4)(B) or 8(e) and dismissed

the complaint in its entirety. The Board held that neither the June 21, 1973 resolution of the executive committee nor its presentation to the membership for adoption constituted inducement or encouragement of employees to refuse to perform services under Section 8(b)(4)(i)(B) (id. at 10a-11a). It also found the evidence insufficient to hold the Union responsible for inducing or encouraging any conduct of the sketcher on the Van Etten job (id. at 12a-13a).

The Board further found no violations of Section 8(b)(4)(ii)(B). It characterized the statements of Union officials on November 13, 1973 and July 19, 1974 as "no more than reiteration of [the Union's] position that it would not relinquish its rights under the collective-bargaining agreement" and thus they contained no threat to pursue those rights through other than lawful means (id. at 11a).

With respect to the Babies Hospital Addition, the Board, adhering to its prior decision in Associated General Contractors, 207 NLRB 698 (1973), reversed sub nom. Associated General Contractors v. N.L.R.B., 514 F.2d 433 (9th Cir. 1975), held that by filing a grievance against General the Union did not violate 8(b)(4)(ii)(B) and that the contract as so applied did not violate Section 8(e) (id. at 11a-12a):

> By instituting the grievance proceeding against General Sheet Metal, the Respondent merely 'sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through peaceful means provided by the agreement and by no other means.' As the Board stated in Associated General Contractors at 700:
>
> [A] contractual agreement, such as we have before us, for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute. Consequently, we find the Union's use of its contract in its dispute with Ohland did not constitute statutorily proscribed threats, coercion, or restraint." (Footnote omitted.)

Finally, the Board concluded that having found that the Union:

> has not resorted to the coercive tactics proscribed by the Act, we find it unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed. (id. at 13a).

C. The Court of Appeals' Decision

The court of appeals, in a 2 to 1 decision, affirmed the Board's order in part and reversed in part. The majority first analyzed the contract clause under Section 8(e) and concluded that the clause, as applied to moduline units, was not designed to preserve work for union members under National Woodwork Mfrs. Ass'n

v. N.L.R.B., 386 U.S. 612 (1967). It did so on the basis of its agreement with the Administrative Law Judge ("ALJ") that the moduline unit was a "new and different product" and therefore that "fabrication of the Moduline plenums 'is not work traditionally and historically performed by members of Local 28'" (App. A, infra, p. 18a). It rejected the Board's request for a remand should the court deem it necessary to reach this question (id. at 17a, footnote 9).

Judge Smith dissented from this part of the majority's opinion, writing that the "Board might well find that the plenum was not a new product but one within the competence and experience of the New York subcontractors and the members of Local 28" and that the "Board could therefore have found that the union's objective was preservation of work" (id. at 29a-30a). Since the Board had not reached this question, Judge Smith would have remanded to the Board for further findings.

The court then addressed the (i) and (ii) issues. It agreed with the Board that none of the Union's conduct violated (i) but disagreed with the Board's conclusions on (ii). It rejected the Board's "apparent position—that contractually based peaceful means of seeking a secondary end are legal" (id. at

25a). It conceded that judicial enforcement of the contract though "somewhat coercive" would not have been the kind of coercion Congress intended to make unlawful (id. at 24a-25a). After expressing doubt that even recourse to "bona-fide arbitration procedures" would be the equivalent of court enforcement, it held that because the grievance procedure here included an appeal to a Joint Adjustment Board composed of an equal number of employer and Union representatives, any similarity between court enforcement and arbitration was not present here because of the absence of a "neutral factfinder with no stake in the outcome of the dispute" (id. at 27a-28a). Therefore, the court concluded that both the Union's statements that it would not allow Carrier units into New York and its invocation of the grievance procedure were "threats, restraint and coercion" within the meaning of Section 8(b)(4)(ii)(B).

REASONS FOR GRANTING THE WRIT

1. With respect to Question I, the court of appeals, in determining the primary-secondary and work preservation issues in the absence of findings by the Board on these issues, has so far departed from the accepted and usual course of proceedings on review of the decision of an administrative agency as to call for an exercise of this Court's power of supervision.

Furthermore, in denying the Board's request for remand, the court of appeals decided an important question of federal law concerning the scope of the work preservation doctrine under National Woodwork without affording the Board an opportunity to decide the issue in the first instance.

(a) A Remand to the Board was Required

A violation of Section 8(b)(4)(B) of the Act requires findings both that a union has engaged in unlawful conduct under subsections (i) or (ii) and that an object of that conduct is one prohibited by that section. Here, the Board reversed the ALJ, found no unlawful conduct and thus found it unnecessary to reach the question of the lawfulness of the Union's object.

Most recently, this Court in N.L.R.B. v. Enterprise Ass'n, Local 638, ___ U.S. ___, 97 Sup. Ct. 891, 905 (1977) criticized the Court of Appeals for the District of Columbia Circuit for substituting its own view of the facts for those of the Board in determining whether a union's object in engaging in (i) and (ii) conduct was secondary and unlawful:

> The statutory standard under which the Court of Appeals was obliged to review this case was not whether the Court of Appeals would have arrived at the same result as the Board did, but whether the Board's findings were 'supported by substantial evidence on the record

considered as a whole.' 29 U.S.C. §160(e). It appears to us that in reweighing the facts and setting aside the Board's order, the Court of Appeals improperly substituted its own views of the facts for those of the Board." (Citations omitted.)

A fortiori, where, as here, the Board has made no findings concerning the lawfulness of the Union's object because in its view the Union did not engage in conduct violative of (i) or (ii) of Section 8(b)(4)(B) and the court of appeals disagrees, a remand for Board findings on the object of the Union's conduct is required.

The court rejected the Board's specific request for a remand on this issue on the ground that "additional findings would be of little assistance" and that the "ALJ's finding of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation" (App. A, infra, p. 17a, footnote 9). By so doing, the court abrogated a function that has historically been reserved to the Board in the first instance.

In support of its refusal to remand, the court erroneously cited Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496 (1951) for the proposition that Board findings are entitled to "less value"

when the court has available the findings of the Board's hearing officer (ibid.). In Universal Camera, the Court held only that upon review of a Board decision under the "substantial evidence" rule, the report of the hearing officer is a part of the record that must be considered in applying that test. The Court noted that the "significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U.S. at 496. On the work preservation question, the credibility of witnesses was not at issue here; rather it was the weight to be given to conflicting facts from which different conclusions might be drawn. It is precisely that kind of inquiry to which the Court addressed itself in Enterprise and in which it reaffirmed the substantial deference that must be accorded to Board findings. See also N.L.R.B. v. Hearst Publications, Inc., 332 U.S. 111 (1944). In that context, the conclusions of the ALJ are entitled to little, if any, weight.[2]

Moreover, the court below erred in finding that the ALJ's findings of fact were "essentially accepted" by the Board. First, the Board in its opinion adopted the findings of the ALJ "only to the extent consistent herewith" (App. B, infra, p. 2a).

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2. It is anomalous that the court of appeals in the instant case affirmed the Board's reversal of

Second, the Board expressly declined to make any findings with respect to the questions essential to a determination of the lawfulness of the Union's object (id. at 13a). In several instances, the Board's statement of facts merely recited the contention of Carrier[3] without indicating whether it agreed with that contention and, if it would, what, if any, conclusions were properly to be drawn therefrom.

(cont.)

ALJ's findings that certain Union conduct was unlawful under (i).

3. With respect to the ability of Union members to perform the work in question, the Board merely stated:

> Carrier's position is that, due to the design of the moduline units, specially trained personnel working under the supervision of Carrier engineers and utilizing costly equipment are required to perform the work of mating the plenum to the control portions of the unit and the calibration and adjustments necessary to assure proper plenum and air flow. (App. B, infra, p. 5a).

And again, after reviewing prior efforts to have the plenum for the Carrier units fabricated in New York shops, the Board stated only:

> Carrier contends that the fabrication of the plenums in New York shops made the moduline units defective and uncompetitive in price, and consequently difficult to market (id. at 6a).

Under all these circumstances, the court's refusal to remand was manifest error.

(b) Important Federal Questions Are Involved in the Issues Not Decided by the Board

The facts of this case present an important question under the Act concerning the scope of the work preservation doctrine under National Woodwork. The ALJ, the Board and the court of appeals agreed that Union members have traditionally fabricated and installed plenums on conventional air-conditioning units. The ALJ found, however, that Carrier's moduline unit was a "new and different product" and that fabrication of the moduline plenums "is not work traditionally and historically performed by members of the Union"(App. A, infra, p. 18a). The Union excepted to this finding by the ALJ; it was neither reviewed by the Board nor did the Board express any views as to the conclusions which might be properly drawn from the finding. Neither the ALJ, the Board nor the court of appeals found that the plenum itself was a new product.

The precise parameters of the work preservation doctrine are still unsettled. In National Woodwork, the Court noted that it had "no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to

monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product " (386 U.S. at 630-31). See also concurring opinion of Mr. Justice Harlan, 386 U.S. at 648. The Board and at least one Circuit Court of Appeals have stated the work preservation question to be not only whether the precise work involved has been "traditionally performed" but whether it is "fairly claimable" by bargaining unit employees. Local 282, Int'l Brotherhood of Teamsters (D. Fortunato), 197 NLRB 673 (1970); Sheet Metal Workers Int'l Ass'n, Local 223 v. N.L.R.B., 498 F.2d 687, 693-96 (D.C. Cir. 1974); Meat and Highway Drivers Local 710 v. N.L.R.B., 335 F.2d 709, 716 (D.C. Cir. 1964); cf. American Boiler Mfrs. Ass'n v. N.L.R.B., 404 F.2d 547, 551 (8th Cir. 1968).

In applying this test, the Board has noted that to "define unit work narrowly according . . . to the newness of the product" would effectively deny a union "any remedy for piecemeal reduction and potential elimination of work unit opportunities." Retail Clerks Union, Local No. 648 (Brentwood Markets, Inc.), 171 NLRB 1018, 1020 n. 5 (1968). The D. C. Circuit has upheld a union claim to work on "substituting materials" for work traditionally performed. Local 433, United Brotherhood of Carpenters, 509 F.2d 447 (D.C. Cir. 1974). In National Woodwork, the Court rejected the employers' argument that work preservation clauses must give way to economic factors and

technological improvements. 386 U.S. at 644. Carrier's claim and the court's opinion below rest essentially on those factors, relative economies and alleged technological developments, all considerations rejected by the Court in National Woodwork.

Whether the court here rejected the "fairly claimable" test as inappropriate under National Woodwork or found it inapplicable on the facts cannot be determined from a reading of its decision. If the former, there is a conflict among the circuit courts on this issue. But in either event, the issue is certainly of sufficient importance that the views of the Board should have first been ascertained.

2. With respect to Question II, the court of appeals decided a significant federal question unanswered by the Court in Enterprise. Simply stated, that question is whether a union, prohibited under Enterprise from picketing to enforce a work preservation clause, is also precluded from asserting a claim for breach of that clause against the contracting employer pursuant to the grievance and arbitration machinery of the collective bargaining agreement. The court of appeals' decision on this issue is in conflict with important federal labor policies and at variance with those expressed by at least two other circuit courts.

The crucial facts here are that the Union filed a grievance against General based on General's consent to install Carrier moduline units with plenums attached in violation of the collective bargaining agreement. The Union requested as a remedy only that General pay into the Union's sick pay fund an amount equal to the time actually lost by its members as a consequence of General's breach. At no time did the Union interfere with General's performance of the work; at no time did it seek that General cease doing business with any other person. Nonetheless, the court of appeals determined that the filing of the grievance was (ii) conduct under Section 8(b)(4)(B) and that the collective bargaining agreement as applied, violated Section 8(e).

a. The Court's Decision is in Conflict with Federal Labor Policy in Favor of Grievance And Arbitration Procedures

The court's holding that utilization of contractually agreed upon methods of contract enforcement constitute a "threat, restraint or coercion" within the meaning of Section 8(b)(4)(ii)(B) flies in the face of provisions of the same Act expressly making "[f]inal adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the

application or interpretation of an existing collective bargaining agreement" (Section 203(d), 29 U.S.C. 173(d)). This policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). Arbitration is "the substitute for industrial strife." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). The holding of the court below that utilization of agreed upon grievance machinery is a restraint or coercion is therefore "completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." Local 174, Int'l Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 105 (1962).

The court, after acknowledging that judicial enforcement of the contract would not be restraint or coercion and perhaps recognizing the incongruity[4]

4. It would indeed by difficult to explicate why collective bargaining agreements not containing means for resolving grievances should have a preferred position over those that do. Moreover, since recourse to the contractual machinery is a prerequisite to any action under Section 301 (see Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)), judicial enforcement was not available to the Union here.

of a holding that arbitration is restraint and coercion, found that the contractual procedure here was not the equivalent of bona fide arbitration because the grievance procedure involved a board of 24 members, half from the Union, half from the subcontractor's association (App. A, infra, p. 27a-28a). While in fact the grievance procedure here provides for arbitration of disputes not settled by the Joint Adjustment Board, the Court has on several occasions upheld the enforceability of awards from such boards under Section 301 of the Act, 29 U.S.C. 185. See Humphrey v. Moore, 375 U.S. 349 (1964); General Drivers, Local 89 v. Riis & Co., 372 U.S. 517 (1963). Thus, the decision below is contrary to the clear mandate of national labor policy and the decisions of this court.

b. The Court's Decision is in Conflict with Decisions of Other Circuit Courts of Appeal

Assuming, arguendo, the existence of any circumstance under which resort to peaceful grievance and arbitration machinery would violate (ii), a necessary prerequisite to any 8(b)(4)(B) violation is a finding of a "cease doing business" object. N.L.R.B. v. Local 825, International Union of Operating Engineers, 400 U.S. 297 (1971). The precise issue in the Enterprise case was the question of whether, in the context of that case, an object of the union's

picketing of Hudik (the subcontractor and the party to the work preservation agreement) was to force others (Austin, the general contractor, and Slant-Fin, the manufacturer) to change their manner of doing business or to force Hudik to terminate its contract with Austin. The Court affirmed the Board's finding that such an object existed and that the "union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by 8(b)(4)(B)" (97 Sup. Ct. at 905). Left open by that decision was the question of whether any alternative mechanism exists for enforcement by a union of a contract with a subcontractor like Hudik.

The answer given by the court of appeals here is in the negative. On the other hand, both the D.C. Circuit and the 4th Circuit have stated contrary views. In Enterprise Ass'n, Local 638 v. N.L.R.B., 521 F.2d 885 (D.C. Cir. 1975), reversed, ___ U.S. ___, 97 Sup. Ct. 891 (1977), while the five-judge majority thought that picketing to enforce the contract was lawful, a conclusion rejected by this Court, the four-judge minority agreed with the majority that peaceful pursuit by the Union of a remedy of recompensing employees for the value of the work lost as a consequence of Hudik's breach of its collective bargaining agreement would have been lawful (id. at 937-40). Clearly, all nine members of the court regarded the

contract as enforceable; their only dispute was as to the means. The Fourth Circuit has also expressed the view that work preservation clauses can be peacefully enforced even in a context in which the contracting employer does not have the right to control assignment of the work. George Koch Sons, Inc. v. N.L.R.B., 490 F.2d 323, 327 (1973). The opinion of the Board here and in Associated General Contractors, supra, also supports that conclusion.

Although this Court has not yet addressed this precise question, it has had occasion to observe that even secondary activity "could have a limited goal and the forseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met." N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, supra, at 305. The Second Circuit also recognized this same limitation on 8(b)(4)(B) and 8(e) in Danielson v. Int'l Org. of Masters, Mates & Pilots, 521 F.2d 747 (1975). There, a collective bargaining agreement was challenged under Section 8(e). The court first found the agreement not to be one of work preservation under National Woodwork. However, the union also urged that since it did not seek to restrain the sale but only to collect damages, the agreement did not force the seller to cease doing business with any other person. In rejecting this

claim, the court noted that the contract did not provide the seller "with a reasonable alternative (e.g. payment of a fixed sum) that would permit it to sell a vessel without compliance with [the contract]" (Id. at 753).

Here the Union not only did not engage in prohibited secondary activity, but it sought only compensation in the amount of $2,153.60 for the loss of work occasioned by the employer's breach of the collective bargaining contract, a result far removed from that condemned in Enterprise. General on its own volition ceased the work for a short period of time until Carrier agreed to reimburse it for the cost of the grievance settlement.

The effect of the settlement reached here and possible awards to similar effect in the future does in no way preclude purchase of Carrier units with plenums attached or prevent subcontractors under contract with the Union from bidding on such jobs. As so applied, the agreement and its maintenance are addressed only "to the labor relations of the contracting employer vis-a-vis his own employees." National Woodwork, supra, at 645. For contractors such as General, this simply means that they must take into account another element in their costs in bidding on such jobs, a consequence insufficient to

meet the cease doing business requirement as explicated by the Court in N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, supra.

The importance of this federal question is apparent—if the Second Circuit is correct that seeking redress through a contractual grievance procedure constitutes coercion under (ii), the signatory employer may breach its contractual commitments with impunity.

For all of the foregoing reasons, the court erred not only in holding that 8(b)(4)(ii)(B) had been violated, but in finding an 8(e) violation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

SOL BOGEN
One Pennsylvania Plaza
New York, New York 10001
Counsel for Petitioner

APRIL, 1977

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Petitioner,

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CARRIER AIR CONDITIONING CO.
and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25—September Term, 1976.

(Argued September 15, 1976 Decided December 2, 1976.)

Docket No. 76-4046

CARRIER AIR CONDITIONING CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,

Intervenor.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Review of an order of the National Labor Relations Board, dismissing unfair labor practice charges against New York sheet metal workers' union by manufacturer-prefabricator of plenums for air conditioning units and reversing findings of administrative law judge that union had violated §§ 8(b)(4)(i)(B), 8(b)(4)(ii)(B), and 8(e) of the National Labor Relations Act, in connection with

application of "no subcontracting" clause in contract with local sheet metal contractors.

Affirmed in part, reversed in part, and remanded.

KENNETH C. MCGUINESS, Washington, D. C. (Robert E. Williams, Douglas S. McDowell, Washington, D. C., of counsel), *for Petitioner.*

MICHAEL S. WINER, Attorney, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, John S. Rother, Attorney, National Labor Relations Board, of counsel), *for Respondent.*

SOL BOGEN, New York, N. Y., *for Intervenor.*

Brief for Air-Conditioning and Refrigeration Institute, Air Moving and Conditioning Association, American Boiler Manufacturers Association, American Consulting Engineers Council, Architectural Woodwork Institute, Associated Builders and Contractors, Inc., National Society of Professional Engineers, and National Woodwork Manufacturers Association, as amici curiae in support of petitioner, filed by George Miron, Washington, D. C. (Wyman, Bautzer, Rothman & Kuchel, Washington, D. C., of counsel).

OAKES, *Circuit Judge:*

A respected commentator on the difficult subject of labor secondary boycotts has written that "[t]he pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others."[1] The case before us presents a classic confrontation between productivity and job security interests, with neutrals caught in the middle; the legal instrument, however far from the ideal, is sufficiently sensitive to furnish us guideposts to decision.

The productivity interest is espoused by the petitioner, Carrier Air Conditioning Co. (Carrier), the charging party before the National Labor Relations Board (the Board or NLRB); Carrier here seeks review of an NLRB order dismissing its General Counsel's complaint. The job security interest is espoused by Sheet Metal Workers' International Association, Local 28, AFL-CIO (the Union or Local 28), intervenor herein and the party against whom Carrier's charges were filed. The neutrals in this dispute are New York City area sheet metal and air conditioning contractors, who signed an agreement containing a "no subcontracting clause" that is central to this case. As enforced by the Union, the clause had the effect of preventing virtually all sales of a specific type of Carrier air conditioning unit—the Moduline—in New York City.

In its unfair labor practice charges, Carrier alleged that the no subcontracting clause violated § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and that Local 28's actions in relation to the Moduline units violated § 8(b) (4), 29 U.S.C. § 158(b) (4). The Board's General

1 Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1041 (1965).

Counsel issued a complaint to this effect, and an administrative law judge (ALJ) found that the Act had been violated as alleged. The NLRB reversed the ALJ, however, and dismissed the complaint. *Sheet Metal Workers Local 28 (Carrier Air Conditioning Co.)*, 222 N.L.R.B. No. 110 (1976). Carrier's petition for review of the Board's decision was duly filed in this circuit, pursuant to § 10(f) of the Act, 29 U.S.C. § 160(f).

In reviewing the Board's decision, we are mindful of the Supreme Court's injunction in *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644 (1967), that the determination whether Sections 8(e) and 8(b)(4) have been violated necessarily involves an inquiry into "whether, under all the surrounding circumstances, the Union's objective was preservation of work . . ., or whether the agreements and [related activities] were tactically calculated to satisfy union objectives elsewhere." Thus our attention must be directed to the remoteness of the threat to the Union of job displacement by the product at issue, the history of relations between the Union and Carrier, and the "economic personality" of the industry. *Id.* at 644 n.38. Such an inquiry necessitates examination in depth of the facts, as to which the ALJ's findings regarding the credibility of witnesses will be adopted here, as they were by the NLRB, 222 N.L.R.B. No. 110, slip op. at 2 & n.3. This examination, coupled with the applicable law, leads us to conclude that the Board erred in various respects. We accordingly affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

In an agreement with Local 28 for the time period August 1972-June 1975,[2] the New York City Chapter of the

2 An earlier agreement, covering the period August 1969-June 1972, contained a similar provision. *See also* note 6 *infra*.

Sheet Metal and Air Conditioning Contractors National Association (the Association) consented not to "subcontract out" work relating to, *inter alia,* "plenums," on the express ground that performance of this work by Local 28 members would help "preserv[e] . . . the work opportunities of the . . . sheet metal workers . . . within the collective bargaining unit . . ."[3] A plenum may be briefly described as a four-sided box made of sheet metal that is attached to an air conditioning unit; it helps to regulate the flow of air into a room, as well as to abate noise. If an Association contractor were to violate the agreement by subcontracting out work on plenums to employers other than those within the collective bargaining unit, the agreement provided for censure for the first offense and for the imposition of a

3 The no subcontracting clause provided in part:

> For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow, except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:
>
> 1. Radiator enclosures. . . .
> 2. Functional louvers.
> 3. Attenuation boxes. . . .
> 3a. Sound traps.
> 4. Dampers. . . .
> 5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding ½ Round Gutters).
> 6. Air handling units in excess of 30,000 C.F.M.'s.
> 7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.
>
> All the work described in this "no subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this Agreement.

fine, "commensurate with the loss . . . sustained by journeyman sheet metal workers by reason of such violation," for subsequent offenses. The amount of the "loss sustained" was to be determined by a Joint Adjustment Board established by the contract, the Board consisting of twelve members designated by the Association and twelve by the Union.

The plenums of concern here are attached to the type of Carrier air conditioner known as the Moduline, which the ALJ found was "a new and different product." Opinion of James V. Constantine, *Administrative Law Judge,* slip op. at 21 [hereinafter cited as ALJ's Opinion]. The Moduline units are installed in ceilings and connected by ducts to a central fan room, where outside air is drawn into the building, conditioned, and forced by fan pressure through the ducts to the Moduline units. Air passes through the plenum portion of the unit and thence, by virtue of the plenum's air pressure being higher than room pressure, through a distribution baffle, past a bellows, and ultimately into a room through a diffuser. The entire Moduline unit, except for the diffuser slots, is concealed in the ceiling.

Carrier began marketing the first model of the Moduline series, Model 37P, in the early 1960s and around 1970 developed a more sophisticated unit known as Model 37A. Presently both types of units are marketed throughout the United States, except in New York City, and are installed with plenums that are prefabricated and attached at Carrier's Tyler, Texas, plant,[4] whose workers are organized by another local of the same international union here involved.

In reaching the conclusion that the Moduline is a "new" product, the ALJ evidently credited testimony by Car-

4 The parties stipulated below that sheet metal workers locals in all areas of the country except New York have allowed, without objection, installation of Modulines with prefabricated plenums.

rier's "engineering section manager" for Modulines to the effect that attaching the plenum to the control unit is a far more complex operation on the Moduline than it is on conventional air conditioning units. *See* ALJ's Opinion at 11, 22. Specifically, the manager testified that the process of calibration, by which the bellows assembly is adjusted to assure proper plenum pressure and air flow, is the "whole heart" of the Moduline and that it requires the use of special calibration machines located only at the Texas plant. He further testified that Carrier's Texas plant is specifically designed to manufacture Modulines with the plenums attached, that the Texas personnel have been specially trained to perform the plenum calibrations, and that "it would be extremely difficult" to fabricate plenums and attach them to Moduline outside the Carrier Moduline plant. This difficulty is the greater on the more sophisticated Model 37A, because its "bellows assembly . . . is a part of the plenum [and] has to be attached to the plenum in order to be adjusted or calibrated."

The evidence credited by the ALJ indicates that Local 28 has consistently opposed installation of Modulines in the New York area. Carrier first sought to install the Model 37P units in 1966 in a hospital project and in Carrier's own offices in Manhattan. At a meeting late in that year, Local 28 officials told Carrier's district manager that the Modulines "could not come into New York" unless the plenums were made in New York in a shop affiliated with Local 28. When some of the 37P units were delivered in early 1967, the union officials stated that they could not be installed. A few days later, the officials and Carrier's district manager reached an agreement under which the Union would allow Modulines to be installed in the hospital project and Carrier's offices in exchange for Carrier's attempting to redesign the 37P so that the plenum could

be made in New York and later joined to the remainder of the unit.

In late 1967 and 1968, the redesigned 37P was given its first test. After union officials objected to installation of 37Ps with prefabricated plenums in a Manhattan police office building, Carrier agreed to have the plenums manufactured by a New York sheet metal company whose employees were represented by Local 28. The plenums so manufactured, however, did not fit properly, leaked air, and were noisy; as a result, Carrier, which had guaranteed to the City the proper functioning of the units, was obliged to spend $10,000 correcting the defects. The ALJ found that the same problem occurred on a few other small projects in the late 1960s as to which, pursuant to Carrier's agreement with Local 28, plenums were made in New York and joined to the Texas-made control unit. The ALJ concluded that New York area sheet metal contractors were "[unable] . . . to fabricate a workable plenum." ALJ's Opinion at 22. Carrier's district manager, in testimony credited by the ALJ, *see id.*, explained the business result of this inability in simple terms: "We just couldn't sell the [redesigned] unit."

In mid-1970, following the unveiling of the new Model 37A Moduline, Carrier spokesmen met with Union officials in an attempt to convince them that the new models should be allowed into New York with their prefabricated plenums. Carrier argued that the Model 37A could not be produced without a plenum installed at the factory. Meetings went on for over two years without any resolution of the dispute until, in October, 1972, following a change in Union leadership, the new president referred the issue to a Union "research and review committee," composed of three Local 28 members who were recognized experts in the sheet metal industry.

In October, 1972, the committee submitted a report unanimously recommending that the Union *accept* Modulines with prefabricated plenums. A principal reason for this recommendation was the committee's belief that use of Modulines in New York would result in *increased* work opportunities for Local 28 members. This was true because the Moduline system requires an extensive network of distribution ducts, which would be installed by sheet metal workers, whereas alternative systems either cool by water circulation, which involves primarily work for plumbers, or utilize rooftop units, which require little duct work. A few months later, a study by the New York sheet metal industry reached similar conclusions.

While Local 28's president endorsed the committee report, on submission to the Union's executive board, the report was rejected. The executive board recommended that the Union continue to oppose installation of Modulines with prefabricated plenums, and this recommendation was adopted by the Local 28 membership in June, 1973. A few months earlier, in a related proceeding, a sheet metal industry representative had asked the Joint Adjustment Board, established by the Union-Association agreement, to modify the agreement to allow at least a "pilot project" using Modulines. This proposal was rejected by both the Joint Adjustment Board and the Union's executive board.

In mid-1973, a construction contract was awarded for the Van Etten Drug Treatment Center in the Bronx, New York. The architects for this projct specified the use of Carrier Modulines or their equivalent, and 92 Model 37A units were duly ordered. In October, 1973, a member of Local 28, a "sketcher" employed by the subcontractor who was to install the units, erased the Modulines from the blueprint drawings he was assigned to prepare. This led to a telephone conversation between Carrier's district manager and Local 28's president; the ALJ credited the

manager's version of this conversation. ALJ's Opinion at 23. In this version, the Union president confirmed that he had "refused to let them sketch the [Van Etten] job" and that he would "not permit this [Moduline] unit to come . . . into New York." Shortly thereafter, Carrier filed the first of the unfair labor practice charges that have culminated in the case before us. Over the next few months, the parties continued discussions and eventually reached an agreement under which Local 28 allowed installation of Modulines on the Van Etten job in exchange for Carrier asking the NLRB not to proceed on its unfair labor practice charge until after the Union election in July, 1974.

During the first half of 1974, Carrier Moduline units were also specified by architects on another job, known as the "Babies Hospital Addition" to Columbia Presbyterian the Association's agreement with Local 28, but nevertheless Hospital, and were duly ordered. The subcontractor who was to install the units, General Sheet Metal, Inc. (General), was a member of the Association and thus bound by agreed to install the Modulines with prefabricated plenums. Following the election of a new Union president in July, the Union reviewed its position, decided to "insist" that the agreement be enforced "as written," and filed charges against General with the Joint Adjustment Board, alleging that General had accepted work in violation of the agreement. The remedy proposed by the Union was the payment by General into the Local 28 Sick Dues Relief Fund of $2,153.60, a sum claimed to represent the actual wage loss to the Union caused by the use of prefabricated plenums. Shortly thereafter, General ceased installation of the Modulines. Before the Joint Adjustment Board could act on the grievance, General, in March, 1975, paid the requested sum into the Union's fund and resumed installation of the Moduline units at the hospital. Carrier, however, reim-

bursed General for the full amount of the settlement payment, pursuant to an agreement between them.

II. Section 8(e)

Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. . . ." [5] A brief review of the history of the section is helpful in understanding the nature of the issues presented here. When passed in 1959, as part of the Landrum-Griffin amendments to the National Labor Relations Act, § 8(e) was designed to close a loophole in the secondary boycott provisions of the Act. In *Local 1976, United Brotherhood of Carpenters* v. *NLRB (Sand Door)*, 357 U.S. 108 (1958), the Supreme Court had stated that an employer's voluntary execution or observance of a contractual provision not to handle nonunion material (known as a "hot cargo" clause because of its wide use in Teamsters Union contracts) was not a violation of the Act. By passing § 8(e) in response to the *Sand Door* decision, Congress made such contractual provisions themselves unlawful. *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 634. At the same time,

5 A proviso to § 8(e) excepts from the proscriptions of that subsection agreements relating to the contracting or subcontracting of onsite construction work. But the proviso does not cover work done elsewhere than on a construction jobsite. *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 630 (1975); *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 638-39 (1967). All parties apparently concede that the proviso is not applicable here, because the work in question, fabrication of plenums, would have been done in offsite sheet metal shops.

however, it retained the distinction between contractual provisions and actions with a secondary purpose and those intended by employees "to preserve for themselves work traditionally done by them." *Id.* at 635. *See* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRB §§ 8(b)(4) and 8(e),* 113 U. Pa. L. Rev. 1000, 1013 (1965); Note, *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork,* 21 Syracuse L. Rev. 907, 909-10 (1970). In short, § 8(e) was directed against "agreements which obligated neutral employers not to do business with other employers involved in labor disputes with the union," 386 U.S. at 636, but not against "primary work preservation agreements," *id.* at 639. But the line between the two types of agreements, however clear in the abstract, often becomes indistinct when the statute is applied to concrete facts. *See Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 386-87 (1969) (Harlan, J.) (lines "separating 'primary' from 'secondary' activities" are "arbitrary, tenuous, and shifting"); *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 645. *See also NLRB* v. *National Maritime Union,* 486 F.2d 907, 911-12 (2d Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

The Board's brief argues that, in deciding whether the agreement between the Union and the Association had a work preservation objective or instead was "tactically calculated to satisfy union objectives elsewhere," 386 U.S. at 644, we are limited to considering the words of the agreement and the circumstances surrounding the making of the agreement. We find such a limitation untenable. On an issue like this one, words in an agreement will often amount to little more than routine recitations in anticipation of future litigation, such as the reference to work preserva-

tion in the agreement in the instant case, *see* note 3 *supra*.[6] Moreover, Congress, in passing § 8(e), made clear its intention to proscribe, in the wake of *Sand Door*, not merely the signing of a "hot cargo" agreement, but also voluntary employer adherence to such an agreement. *See National Woodwork Manufacturers Association* v. *NLRB*, *supra*, 386 U.S. at 634; Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904, 913-14 & n. 37 (1976). While there may be a few situations in which an approach testing the relevant contractual provision as it has been applied could cause otherwise valid agreements to be invalidated because of one illegal union action, *see Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), this case does not present such. We agree with the Ninth Circuit that a facially valid agreement may be invalid for § 8(e) purposes in particular factual contexts. *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 439 (9th Cir. 1975). In its other applications, the same agreement may retain its validity. *See* Leslie, *supra*, 89 Harv. L. Rev. at 914.

Our analysis regarding the congressional purpose underlying § 8(e) also helps to explain why the §8(e) charge is not barred by § 10(b) of the Act, 29 U.S.C. § 160(b), which establishes a six-month limitation period between the occur-

6 The work preservation references at the beginning of the no subcontracting clause and in numbered paragraph 7 thereof are complemented by the last paragraph, which provides that all work for which subcontracting is proscribed shall be performed by Local 28 members. *See* note 3 *supra*. The last paragraph was not contained in the earlier, 1969-1972 agreement; the Union's counsel indicated to the ALJ that the paragraph was added to emphasize the Union's work preservation goals. The emphasis was hardly necessary for purposes of the agreement, however, since the Association members were already bound, by the preceding paragraph of the clause, to do the specified work in their own or other Local 28-organized shops. One can only surmise that the added language was window dressing, intended to impress, perhaps, the potential arbiters of any § 8(e) dispute that might arise—the ALJ, the NLRB, or the members of a reviewing court.

rence of an unfair labor practice and the filing of a charge with the NLRB.[7] The statute proscribes only "enter[ing] into" certain agreements, and, if this language were taken to mean that only the signing were prohibited, the six-month period would have passed here long before Carrier filed an unfair labor practice charge. The "enter into" language of § 8(e) has not been so construed, however. Instead, this court and others, as well as the NLRB, have held that a union may "reaffirm" an agreement, and thus, in effect, "re-enter" into it, by seeking to enforce it, at least when the enforcement effort itself appears to have a secondary objective. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 754 (2d Cir. 1975); *NLRB* v. *Local 28, Sheet Metal Workers*, 380 F.2d 827, 829-30 (2d Cir. 1967); *Los Angeles Mailers Union No. 9* v. *NLRB*, 311 F.2d 121, 123 (D.C. Cir. 1962) ("To seek to give it life is in substance to seek to have it agreed to, which is no different in substance from seeking to have it entered into"); *Bricklayers & Stone Mason Local 2 (Associated General Contractors)*, 224 N.L.R.B. No. 132, slip op. at 11-13 (1976). *See also NLRB* v. *International Brotherhood of Electrical Workers*, 405 F.2d 159, 164 (9th Cir. 1968) (construing "enter into" language of § 8(b)(4)), *cert. denied*, 395 U.S. 921 (1969); *NLRB* v. *Milk Wagon Drivers Local 753*, 335 F.2d 326, 329 (7th Cir. 1964) (same). Because we conclude, as discussed below, that Local 28's contract enforcement efforts here had a secondary objective, we hold that the § 10(b) limitation period does not bar a finding that § 8(e) has been violated in this case. Moreover, once the possibility of a violation within

7 Section 10(b), 29 U.S.C. § 160(b), provides in pertinent part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

the six-month period is recognized, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period . . . ." *Local 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411, 416 (1960) (Harlan, *J.*).[8]

Turning to the question whether, as applied by the Union in this case, the no subcontracting clause had a valid work preservation purpose or a proscribed secondary purpose, we believe that the facts recited at length above leave no doubt that the object was Carrier and the

8 The Board also argues here that the "enter into" language of § 8(e) requires a showing of a "bilateral agreement," whereas in the instant case the Union acted unilaterally. This argument was not alluded to in the Board's opinion below—indeed, the opinion did not analyze § 8(e), *see* note 9 *infra*—and is thus in the nature of a post hoc rationalization. Moreover, if addressed to the fact that only the Union really cared about enforcing the no subcontracting clause, the argument proves too much, since this must be true of all "hot cargo" agreements.

If addressed to a situation in which an employer signs an agreement and then is reluctant to comply with it, the argument is simply wrong as to both the facts and the law. The signatory Association here joined with the Union in April, 1973, in rejecting, through the Joint Adjustment Board (on which they had equal representation), a proposal to modify the agreement to allow the introduction of Modulines in New York. Moreover, in connection with the Babies Hospital job, General, a member of the Association, acquiesced in the Union's interpretation of the agreement to the extent of paying the full sum requested by the Union in March, 1973; while Carrier reimbursed General, it did so only because General refused to proceed with installation of the Modulines until the grievance was settled. To the extent that an interpretation of an agreement is reflected in actions, therefore, it seems clear that the anti-Moduline interpretation here was a bilateral one. Finally, even if no acquiescence at all by the sheet metal contractors could be found, this fact would not affect the agreement's validity under § 8(e). This court has recently held that a union can unilaterally reaffirm an agreement violative of § 8(e) merely by making a demand for compliance; actual compliance by the signatory employer need not be shown. *Danielson* v. *International Organization of Masters, Mates & Pilots*, 521 F.2d 747, 754 n.8 (2d Cir. 1975).

objective secondary, a conclusion also reached by the ALJ.[9] The Union conceded, before both the ALJ and the Board, that its principal dispute was with Carrier, but, rather than applying leverage directly against Carrier, the Union relied on the no subcontracting clause in its agreement with the Association to keep Modulines out of New York. Such reliance would have been permissible if

9 The Board argues that it did not reach the primary/secondary and work preservation questions in relation to the § 8(e) charge (and the § 8(b)(4) charges) and that, if this court holds the questions must be reached, we should remand to the Board for further findings on these questions. We believe the Board did reach the questions, albeit implicitly, and that in any event such a remand would serve no purpose. The Board was quite cryptic—not to say Delphic—in its fiat that § 8(e) had not been violated by the no subcontracting clause either as written or as applied, *see* 222 N.L.R.B. No. 190, slip op. at 12 & n.10; *cf. Oil, Chemical & Atomic Workers Local 4-243* v. *NLRB*, 362 F.2d 943, 946 (D.C. Cir. 1966) (Board has obligation to state reasons for its disagreement with ALJ), but, given the *National Woodwork* test quoted *supra*, which the Board's brief recognizes as governing, a determination as to the primary/secondary or work preservation nature of an agreement is implicit in every § 8(e) decision. Even if the Board had not reached the issue, moreover, additional findings would be of little assistance in resolving it. The ALJ's findings of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation, which he found more than sufficient for § 8(e) purposes, a conclusion with which we agree. While the Board's expertise on matters within its special competence is of course entitled to deference from this court, *see, e.g., NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975), the Board's findings are of less value when we have before us the findings of the Board's own hearing officer, *see Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951), and when the questions of law are so interrelated with the facts of the case and require for their resolution common sense as much as legal erudition, *see NLRB* v. *Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (on remand) (L. Hand, *J.*). *See also NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 303 (1971) ("here the normally difficult task of classifying union conduct [as primary or secondary] is easy"). As did the Ninth Circuit, we agree with the ALJ on matters that the Board purportedly did not reach. *Associated General Contractors* v. *NLRB*, 514 F.2d 433, 438-39 & n.7 (9th Cir. 1975).

the Union's purpose was work preservation, but this was not the case. It may be true, as the Board found, that "Local 28 members have traditionally fabricated and installed the plenums on *conventional* air-conditioning units." [10] 222 N.L.R.B. No. 110, slip op. at 5 (emphasis added). As the ALJ found, however, the Moduline is not a "conventional" unit, but rather is "a new and different product," and fabrication of the Moduline plenums "is not work traditionally and historically performed" by members of Local 28. ALJ's Opinion at 21. *Compare National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 646. Support for this view can be found in the fact that, when the Moduline was redesigned to allow separate fabrication of plenums in New York,[11] the precision calibration required simply could not be accomplished satisfactorily.

It is thus appropriate that, in assessing the legal significance of the agreement's prohibition on subcontracting work related to "plenums," a distinction be made between the plenums on conventional air conditioning units and those on Moduline units. While, with regard to other

10 Even this statement is open to doubt, at least if it is taken to suggest that Local 28 members fabricated plenums on *all* other units in New York. Carrier's district manager testified—and the Union did not challenge his testimony on this point—that "literally hundreds of thousands" of Carrier units other than Modulines have been installed in New York, in buildings as large as the World Trade Center, with plenums prefabricated at Carrier's Texas plant. Local 28 members installed these units without objection.

11 The few isolated instances in which Local 28 members fabricated Moduline plenums are not, of course, any evidence of such work being "traditionally" performed by Local 28, as the ALJ recognized, ALJ's Opinion at 23. Rather, those instances occurred only because Carrier was seeking to settle the dispute with Local 28 that is the subject of the instant case.

plenums, the no subcontracting clause may have served a valid work preservation purpose, as applied to *Moduline* plenums—part of a new type of air conditioner—the no subcontracting clause served only to aid Local 28 in "'trying to acquire work performed by employees' of Carrier in Tyler, Texas." ALJ's Opinion at 21, *quoting Associated General Contractors* v. *NLRB, supra,* 514 F.2d at 438. In Justice Harlan's words, this is "a case of a union seeking to restrict by contract . . . an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." *National Woodwork Manufacturers Association* v. *NLRB, supra,* 386 U.S. at 648 (concurring memorandum).[12]

III. Section 8(b)(4)

While often described as a "secondary boycott" section of the Act, *see, e.g., NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 686 (1951), § 8(b)(4) in fact proscribes, not all secondary boycotts, but rather "specific union conduct directed to specific objectives," *Local 1976, United Brotherhood of Carpen-*

12 Because we find ample direct evidence of the no subcontracting clause's secondary purpose, unrelated to work preservation, we need not consider whether such a purpose may be inferred on the basis that the Association members here lacked the "right to control" the work sought by the Union. The Board's "right to control" test has been highly controversial, *compare* majority, concurring, and dissenting opinions in *Enterprise Association of Steamfitters Local 638* v. *NLRB,* 521 F.2d 885 (D.C. Cir. 1975) (en banc, 5-4), *cert. granted,* 424 U.S. 908 (1976), has been rejected explicitly by five circuits and perhaps implicitly by our own, *see* citations in *id.* at 888-89 & n.3, and was the subject of recent argument before the Supreme Court, *see* 45 U.S.L.W. 3276 (U.S. Oct. 6, 1976) (argument in No. 75-777, *NLRB* v. *Enterprise Association of Steamfitters Local 638, supra*). In the *Enterprise Association* case, moreover, unlike the instant one, the Board and the court of appeals agreed that the purpose of the union's activities was the preservation of work traditionally performed by its members. 521 F.2d at 888, 900.

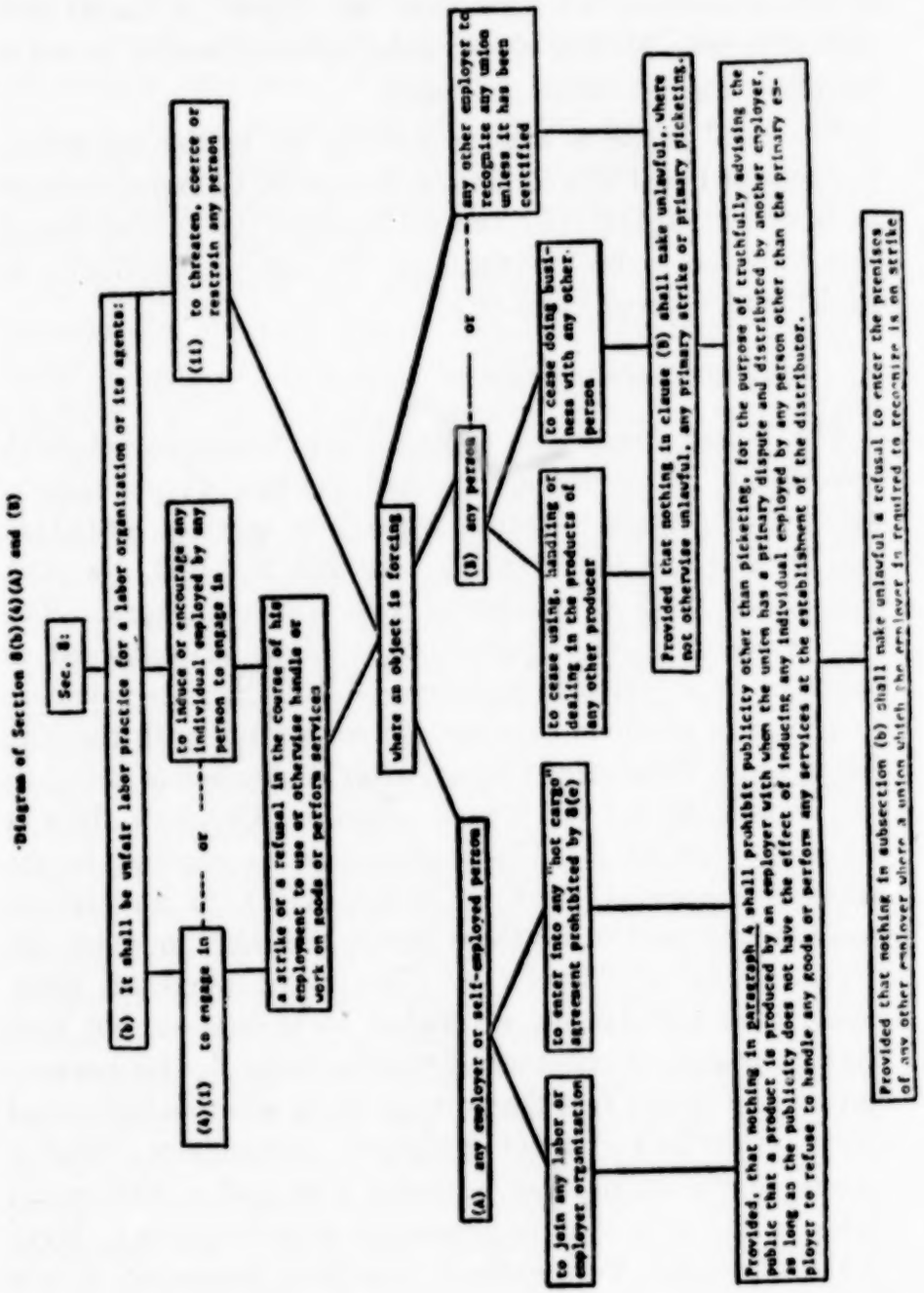
ters v. *NLRB*, 357 U.S. 93, 98 (1958). It does so, moreover, in relatively precise terms, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* 394 U.S. at 388, and the words of the statute must thus be the courts' principal referent in determining whether the section has been violated, *Local 1976, United Brotherhood of Carpenters* v. *NLRB, supra,* 357 U.S. at 100. While specific, however, the section, with its clauses, subclauses, and provisos, is quite difficult to follow; instead of setting out the exact statutory language in the margin, we have reproduced there a useful "roadmap" to § 8(b)(4).[13]

Before a violation of § 8(b)(4)(B) can be found, two separate determinations must be made. One relates to the *nature* of the union's conduct: whether the union or its agents engaged in, induced or encouraged a refusal to perform services (§ 8(b)(4)(i)) or threatened, coerced or restrained any person (§ 8(b)(4)(ii)). The second relates to the *purpose* of the Union's conduct: whether an object was to force any person to cease handling the products of, or doing business with, another. We discuss the first of these issues in detail below, considering separately the alleged violations of clauses (i) and (ii). With regard to the purpose issue, however, our conclusion in the § 8(e) discussion as to the secondary focus of Local 28's activities is equally applicable here. The type of contract prohibited by § 8(e) is one in which the employer agrees to do that which § 8(b)(4)(B) prohibits the union from attempting to force the employer to do; the language of the former subsection "closely tracks" that of the latter. *National Woodwork Manufacturers Association* v. *NLRB, supra,*

13 The following diagram of § 8(b)(4) was developed by Professor David Feller for uses in his labor law courses at the University of California at Berkeley:

(*footnote continued on next page*)

13 (*continued from previous page*)



386 U.S. at 635; *see id.* at 649 (Harlan, *J.*, concurring), 660 (Stewart, *J.*, dissenting). On the basis of facts detailed at length above and our analysis of them in the § 8(e) discussion, we hold that "an object" of Local 28's activities was forcing sheet metal subcontractors to cease handling Carrier Moduline units.

The ALJ made a similar holding as to the secondary purpose of Local 28's conduct and went on to find violations of both § 8(b)(4)(i)(B) and § 8(b)(4)(ii)(B). The Board disagreed as to both violations. We affirm the Board as to (i) and reverse as to (ii).

A. *Section 8(b)(4)(i)(B)*

The Board found the evidence insufficient to establish that Local 28 or its agents had "induce[d] or encourage[d]" employees to refuse to perform services, § 8(b)(4)(i), 29 U.S.C. § 158(b)(4)(i); *see* 222 N.L.R.B. No. 110, slip op. at 12-13, a conclusion with which we agree. The record contains one statement that might be construed as evidence of an attempt by Local 28 to induce its members to refuse to perform services. In connection with the Van Etten Drug Treatment Center, after a member of Local 28 had erased Modulines from blueprints, Carrier's district manager said to the Union president (according to the manager's account, credited by the ALJ), "I understand you have refused to let them sketch the job," to which the president replied, "That's so." The Board found this statement to be ambiguous; we find it to be less so, but note that its weight is substantially undermined by its hearsay nature and by the fact that it represents what an interested party (Carrier's district manager) remembers about a phone conversation that occurred one and a half years prior to the time that he recounted it in testimony. Even if the statement were entirely accepted, moreover, it is a

tractors v. *NLRB, supra,* 514 F.2d at 438 ("when Congress used 'coerce' in Section 8(b)(4)(B) it . . . intended to reach any form of economic pressure of a compelling or restraining nature"); *Local 48, Sheet Metal Workers* v. *Hardy Corp., supra,* 332 F.2d at 686 (term "coerce" was meant to encompass "non-judicial acts of a compelling or restraining nature, . . . consisting of a strike, picketing or other economic retaliation or pressure"); *NLRB* v. *Local 825, International Union of Operating Engineers,* 315 F.2d 695, 697 & n.3 (3d Cir. 1963).

In its brief here, the Board adopts a position that its opinion did not take below. Conceding that the use of a wide range of economic sanctions is proscribed by § 8(b)(4)(ii)—a concession that is virtually unavoidable in light of the authorities discussed in the preceding paragraph—the Board argues that this case involves "not economic retaliation but an agreed upon arbitral procedure for compensation for a breach of contract." It then goes on to argue that, because of the similarities between court proceedings and arbitration, resort to the latter should be treated like resort to the former for purposes of § 8(b)(4)(ii). We need not decide whether resort to bona fide arbitration procedures would constitute unlawful coercion, although it should be noted that the Board's premise of relevant similarities between judicial and arbitral forums is open to serious question, *see Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 57-58 (1974) (Title VII); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960).

We find instead that the contract here did not involve the equivalent of bona fide arbitration. The contractual procedures under which General paid a fine—and pursuant to which other subcontractors were doubtless deterred from accepting work involving Modulines, thus enabling the Union to effectuate its repeated threat to Carrier to keep

a refusal to perform services—simply is not the type of inducement or encouragement that § 8(b)(4)(i)(B) makes illegal. *See NLRB* v. *Local 751, United Brotherhood of Carpenters,* 285 F.2d 633, 640 (9th Cir. 1960) (resolution withholding any recommendation or direction as to a course of action).

B. *Section 8(b)(4)(ii)(B)*

Because we have already held that the Union's conduct had a secondary purpose, the only issue remaining is whether that conduct amounted to the threats, coercion, or restraint prohibited by clause (ii). The Board reasoned that the Union's repeated statements about not allowing Modulines with prefabricated plenums into New York and the Union's invocation of the contractual grievance procedure against General were "merely" attempts to enforce the no subcontracting clause "'through peaceful means provided by the agreement and by no other means.'" 222 N.L.R.B. No. 110, slip op. at 12, *quoting Southern California Pipe Trades District Council No. 16 (Associated General Contractors),* 207 N.L.R.B. 698, 699 (1973), *reversed sub nom. Associated General Contractors* v. *NLRB,* 514 F.2d 433 (9th Cir. 1975). The Board's approach of equating all peaceful, contractually allowed means with noncoercive or nonthreatening means was rejected by the Ninth Circuit in *Associated General Contractors,* 514 F.2d at 438-39, as the Board recognized but was unconcerned with here, 222 N.L.R.B. No. 110, slip op. at 12 n.9. We agree with the Ninth Circuit and accordingly reverse the Board.

The Board's approach fails to distinguish among various ways in which an agreement may be enforced. Resort to the courts for enforcement of a contract provision, while undoubtedly a somewhat coercive act, *see Local 48, Sheet Metal Workers* v. *Hardy Corp.,* 332 F.2d 682, 686 (5th Cir. 1964), does not, to be sure, constitute the sort of coercion that Congress intended to make unlawful. *See, e.g., Acco Construction Equipment, Inc.* v. *NLRB,* 511 F.2d 848, 852 (9th Cir. 1975) (dictum); *Local 48, Sheet Metal Workers* v. *Hardy Corp., supra,* 332 F.2d at 686-87 (extensive citation of legislative history); *Orange Belt District Council of Painters No. 48* v. *NLRB,* 328 F.2d 534, 537 (D.C. Cir. 1964) (dictum).[15] When a contract specifies enforcement procedures that are not judicial in nature, however, nothing in the Act, the legislative history, or judicial decisions precludes a court from characterizing as threats or coercion what any layman would call by those names. Indeed, the legislative history and the decisions on point indicate that Local 28's actions here must be considered conduct violative of § 8(b)(4)(ii).

The Board's apparent position—that contractually based "peaceful means" of seeking a secondary end are legal—is contradicted by the legislative history, which evinces Congress's intention to outlaw a fairly broad range of economic pressure tactics. In introducing the bill that eventually became known as the Landrum-Griffin Act, Representative Griffin told the House:

> The courts . . . have held that . . . [a union] may threaten the secondary employer, himself, with a strike *or other economic retaliation* in order to force him

15 Even when the contract provision in question is invalid under § 8(e), as is the one here, resort to the courts should not be considered § 8(b)(4)(ii) coercion. To hold otherwise would be to give the word "coerce" in effect two meanings, since identical acts would be legal in some circumstances and illegal in others, with the determination of legality made after the fact in relation to another statute. *See* Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust,* 89 Harv. L. Rev. 904, 913 (1976). Of course, resort to the courts to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are "unenforcible [sic] and void."

> to cease doing business with a primary employer with whom the union has a dispute. This bill makes such coercion unlawful by the insertion of a clause 4(ii). . . .

105 Cong. Rec. H13,092 (daily ed. July 27, 1959), *reprinted in* 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1523 (emphasis added). Similarly, Senator Goldwater, in an "analysis" submitted to the Senate on the day the President signed the Landrum-Griffin Act, said:

> Thus, although employers and unions . . . may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—*economic or otherwise*—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it.

105 Cong. Rec. A8524 (daily ed. Oct. 2, 1959), *reprinted in* 2 NLRB, supra, at 1858 (emphasis added). Numerous court decisions since passage of the Act have reached similar conclusions after examining the legislative history. *See, e.g., NLRB* v. *Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 68 (1964) ("the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise"); *NLRB* v. *Local 445*, 473 F.2d 249, 253 (2d Cir. 1973) (provision allowing union to enforce lawful hot cargo agreement "by the use of economic force" held invalid under § 8(e), because "Congress intended that enforcement of such provisions may be effected only through the courts"); *Local 644, United Brotherhood of Carpenters* v. *NLRB*, 533 F.2d 1136, 1145 (D.C. Cir. 1975), *quoting Orange Belt District Council of Painters No. 48* v. *NLRB, supra*, 328 F.2d at 537; *Associated General Con-*

poor substitute for direct evidence that Union officials actually told the sketcher that he should erase the Modulines. The record does not indicate that either the Union president or the sketcher was asked about what steps, if any, the president took to effectuate his alleged refusal "to let them sketch the job."

Other than the sketching incident on the Van Etten job, there is no evidence that Local 28 members ever refused to perform services for reasons related to the use of Carrier Modulines.[14] While such evidence is not required to establish a violation of §8(b)(4)(i)(B), since it is the inducement or encouragement itself that is proscribed, *NLRB* v. *Associated Musicians Local 802*, 226 F.2d 900, 904-05 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956), evidence of this sort would certainly have made it easier to infer that a violation had occurred.

Of greater importance is the fact that, other than the Union president's refusal "to let them sketch the job," there is no evidence that Local 28 officials did in any way encourage employees to refuse to perform services. The ALJ cited, as evidence of such encouragement, the resolution, passed by the Union's executive board and adopted by the membership, that refused to modify the agreement to allow installation of Modulines. ALJ's Opinion at 23. We share the NLRB's view that this resolution "merely asked the union members to decide whether their contractual rights should be waived" and that it did not suggest "that the contract would be enforced by proscribed economic action." 222 N.L.R.B. No. 110, slip op. at 10-11. A resolution of this sort—containing a statement of policy but not recommending, explicitly or implicitly, that the policy be enforced by

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14 When Moduline installation work stopped on the Babies Hospital Addition, it was the result of a decision, not by Local 28 members, but by the president of General, the sheet metal subcontractor, acting in response to the grievance filed by the Union. *See* ALJ's Opinion at 18-19.

Modulines out of New York—were to be implemented by the "Joint Adjustment Board" of 24 members, half from the Union, half from the subcontractors' association. The factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute, were conspicuously absent here. The Supreme Court has recently emphasized the courts' obligation to scrutinize with care even arbitration proceedings that superficially appear regular in all respects. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). It follows, a fortiori, that when a contractual grievance procedure does not resemble arbitration, we should not so characterize it.

The fines authorized by the agreement here plainly were applied, or were threatened to be applied, in a way that gave the Union economic leverage over the subcontractors. And, as in *Associated General Contractors, supra,* that leverage "had the desired effect of pressuring [subcontractors] to pressure others to change their business practices." 514 F.2d at 439. It makes no difference that the subcontractors as a group would have formally joined with the Union, through the Joint Adjustment Board, in imposing the fines; as applied to the individual subcontractor, the fines were unquestionably coercive, as is demonstrated by the case of General, which stopped work on the Babies Hospital Addition as soon as a fine was threatened. *See id.* at 436, 439 (fines imposed by a similar joint board); *cf.* Leslie, *supra,* 89 Harv. L. Rev. at 912 & n.28 (suggesting interest of subcontractors as a group in policing compliance of individual subcontractors). Moreover, while the interpretation of the agreement to exclude Modulines was a joint one on the part of the Union and the Association, *see* note 8 *supra,* the initiative for all of the anti-Moduline efforts came from the Union acting uni-

laterally, making the Union's role in the economic coercion as clear as it could ever be. *See Acco Construction Equipment, Inc.* v. *NLRB, supra,* 511 F.2d at 852 ("unilateral fining" by union constitutes "coercive economic pressure"); *NLRB* v. *International Brotherhood of Electrical Workers, supra,* 405 F.2d at 163 ("unilateral rescission" by union is "a form of prohibited economic coercion"). We accordingly find that the Board erred in its holding that Local 28 had not violated § 8(b)(4)(ii)(B).

Order affirmed in part and reversed in part. Case remanded to NLRB for proceedings not inconsistent with this opinion.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. While I agree that we should reject the six-month limitation claim, *Danielson* v. *International Organization of Masters, Mates & Pilots,* 521 F.2d 747, 754 (2d Cir. 1975), *NLRB* v. *Local 28, Sheet Metal Workers,* 380 F.2d 827 (2d Cir. 1967), and that we should reject the Board's reversal of the Administrative Law Judge as to coercion, I would remand for further findings. It can be argued with some basis in the record that the contract provisions barring prefab units in air conditioning equipment unless assembled in Local 28 shops is a work preservation device under *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967). Local 28 is not really trying to improve the lot of Carrier's employees in Tyler, Texas but to maintain employment in New York for Local 28 people in putting together the plenums. See *NLRB* v. *Local 28, supra.*

The Board might well find that the plenum was not a new product but one within the competence and experience

of the New York subcontractors and the members of Local 28.[1]

The Board could therefore have found that the union's objective was preservation of work. Since the Board found the union's actions not coercive, it did not reach this issue.

I agree with the majority that the Board's finding of lack of coercion (which the Board based on the Board's puzzling "peaceful means" test) cannot be sustained. The work preservation issue, however, remains and we should have the benefit of the Board's consideration of this issue before finally disposing of the matter.

I would reverse the Board on the coercive nature of the union's actions, and remand for findings on the work preservation issue.

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1 See the testimony as to the Staten Island Community College job in 1970 set forth in the Administrative Law Judge's opinion (Appendix at 17-18).

APPENDIX B

MFP

222 NLRB No. 110

D--864
Bronx, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL--CIO

and

Case 2--CC--1296

CARRIER AIR CONDITIONING
COMPANY, A DIVISION OF
CARRIER CORPORATION

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL--CIO

and

Case 2--CE--66

CARRIER AIR CONDITIONING
COMPANY, A DIVISION OF
CARRIER CORPORATION

and

THREE BORO SHEET METAL AND
VENTILATING CO., INC.

Party to the Contract

DECISION AND ORDER

On July 17, 1975, Administrative Law Judge James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, the Charging

Party filed limited exceptions, and the Charging Party and the General Counsel filed briefs in support of the Administrative Law Judge's Decision.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Administrative Law Judge's Decision, the exceptions, and briefs, and the entire record in the case,[2] and hereby adopts the findings,[3] conclusions, and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The amended complaint alleges that Respondent violated Section 8(b)(4)(i) and (ii)(B) by adopting a resolution in or about May 1973 that its members would oppose the installation of Carrier's moduline air-conditioning units unless they fabricated the plenums for said units, and by the October 1973 refusal of one of its members employed by Three Boro to perform certain sketching work preparatory to and necessary for the installation of Carrier moduline units. The complaint further alleges that Respondent violated Section 8(b)(4)(i) and

1/ The Intervenor, Sheet Metal and Air Conditioning Contractors National Association (hereinafter SMACNA) did not file a brief.
2/ The Respondent has requested oral argument. The request is hereby denied inasmuch as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.
3/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

(ii)(B) by informing Carrier representatives on or about October 23 and November 26, 1973, that its members employed by Three Boro would not be permitted to make sketches for the Carrier moduline units and on those same dates and again on July 23, 1974, that Respondent was not going to permit Carrier units to be installed in New York because employees represented by it were not fabricating the plenums. Finally, the complaint alleges that by the above acts, the Respondent applied the no-subcontracting clauses in its contracts with SMACNA and Three Boro in violation of Section 8(e). At the hearing, the complaint was amended further to allege that in November 1974, Respondent, by bringing industry charges against General Sheet Metal, Inc., violated Section 8(b)(4)(B) and (e) of the Act. The Administrative Law Judge found the violations as alleged. We disagree. We believe that a contrary result is dictated by our decisions in Associated General Contractors[4] and Kimstock Division.[5]

The collective-bargaining agreement between Respondent and Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., to which Three Boro Sheet Metal and Ventilating Co., Inc., is bound by a separate agreement, contains a no-subcontracting clause which provides in pertinent part:

4/ Southern California Pipe Trades District Council No. 16 of the United Association, et al. (Associated General Contractors of California, Inc.), 207 NLRB 698 (1973).
5/ Southern California Pipe Trades District Council No. 16; Plumbers & Steamfitters Local No. 582 (Kimstock Division, Tridair Industries, Inc.), 207 NLRB 711 (1973).

II. MEMORANDUM CONTAINING
NO SUBCONTRACTING CLAUSE

For the preservation of the work opportunities of the journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit, each Employer within the collective bargaining unit shall not subcontract out any item or items of work described hereinbelow; except that each said Employer shall have the right to subcontract for the manufacture, fabrication or installation of such work with any other Employer within the collective bargaining unit:

1. Radiator enclosures except when manufactured and sold as a unit including heating element.

2. Functional louvers.

3. Attenuation boxes except for mechanical devices contained therewith.

3a. Sound traps.

4. Dampers: All types of Dampers, including Automatic Dampers and multi-Zone Dampers, Manual Control Dampers and Fire Control Dampers, except Patented Pressure Reducing Devices. OBD's and Santrols are per sketches B and C annexed hereto.

5. Skylights, Sheet Metal Sleeves, Pressure Reducing Boxes, Volume Control Boxes, Troffers (plenums), High Pressure Fittings and Gutters (excluding 1/2 Round Gutters).

6. Air handling units in excess of 30,000 C.F.M.'s.

7. All other work historically, traditionally and customarily performed by journeyman sheet metal workers and apprentice sheet metal workers within the collective bargaining unit in accordance with the collective bargaining agreement.

All the work described in this "no-subcontracting clause" shall be performed by journeyman and/or apprentice sheet metal workers in the bargaining unit covered by this agreement.

No penalty is specified in the no-subcontracting clause. However, Rule XIX of the agreement provides that the penalty for violation of the agreement shall

be censure for the first offense; and on the second offense, imposition of a fine commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeyman sheet metal workers by reason of such violation.

Background

Carrier manufactures moduline air-conditioning units. It began the manufacture of a variable volume moduline air-conditioning unit, designated the model 37P unit, in the early 1960's. Later improvements led to the development of the 37A unit which has been manufactured since 1970. Both of these units included prefabricated plenums. Although numerous parts of each are patented, the plenum is not. The plenum is essentially a four-sided sheet metal box which, inter alia, serves for the housing or receipt of air and noise abatement. In the New York metropolitan area, Local 28 members have traditionally fabricated and installed the plenums on conventional air-conditioning units. Carrier's position is that, due to the design of the moduline units, specially trained personnel working under the supervision of Carrier engineers and utilizing costly equipment are required to perform the work of mating the plenum to the control portions of the unit and the calibration and adjustments necessary to assure proper plenum pressure and air flow.

Carrier first attempted to market its moduline unit in the New York metropolitan area in 1966. Carrier had contracts for the installation of 37P units at its home office and at Presbyterian Hospital. At a meeting in November 1966, Respondent's president told Carrier's district manager, Contardi, that the plenum section of the unit should be made in a New York shop having an agreement with Local 28. In January 1967, the 37P units with prefabricated

plenums were delivered to Carrier's home office for installation. The president and a business agent of Respondent told Contardi that these units could not be installed; the plenums would have to be made in New York. The matter was brought before the Joint Trade Board by Respondent. Subsequently, on or about January 29, 1967, it was agreed that the installation of the 37P units would proceed at Carrier's home office and at the Presbyterian Hospital in consideration for which Carrier would redesign the unit so that the plenum could be made in New York.

In September 1967, Carrier became involved in the construction of a new Police Office Building for the City of New York. The building specifications called for the use of Carrier's 37P units. As a result of the objections of Respondent's president to the use of the 37P units, a series of meetings occurred in September and October 1967 between union officials, Carrier's representatives, and representatives of the City. On October 31, 1967, the parties agreed that Carrier would develop a design which would make possible the fabrication of the plenum in New York shops and that Carrier would assume responsibility for the air-conditioning units on the project even though the plenums were to be fabricated in a local shop. Thereafter, the plenums used in the 37P units installed in the Police Office Building were manufactured by Triangle, a shop employing employees represented by Respondent. After installation of these units, it developed that there were serious problems with leakage in the units for which Carrier was held liable. Carrier contends that the fabrication of the plenums in New York shops made the moduline units defective and uncompetitive in price, and consequently difficult to market.

Carrier developed the 37A unit in 1970. On or about August 8, 1970, Carrier representatives met with Respondent's president and other union agents. Carrier representatives showed the union agents the new 37A unit, stating that it was well received throughout the country, that it was a new design, and in their opinion, the plenums for it could not be made in New York. Respondent's response was that a study of the problem would be made. A number of subsequent meetings failed to produce a resolution of the dispute.

In August 1972, Contardi and other Carrier representatives met with Respondent's president, then Daniel Pasquinucci. As a result of this meeting, Pasquinucci referred the matter to the research and review committee, a committee of three union members known for their expertise and experience in the industry. After studying the problem, this committee recommended acceptance of the moduline unit, factory fabricated, leak tested and calibrated.

Facts Surrounding the Alleged Violations

On June 5, 1973, Local 28's executive board adopted a resolution that "no allowance be made in the c.b.a [collective-bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area." This resolution was presented to and adopted by the general membership on June 21, 1973.

In early 1973, plans were prepared for the construction of the Van Etten Drug Treatment Center. The mechanical specifications for heating, ventilation, and air-conditioning called for the use of "variable volume linear air diffusers, Carrier Moduline or approved equal." The heating, ventilation, and air-conditioning contractor on the project, Acme Climate Control Corp., issued a purchase order for the Carrier 37A units pursuant to the specifications. Subsequently, Acme

subcontracted certain sheet metal work, including the installation of the Carrier 37A units on the project, to Three Boro, who was by a separate agreement bound to the terms of the collective-bargaining contract between Respondent and SMACNA. On October 8, 1973, the verbal agreement between Acme and Three Boro was confirmed in a letter in which Three Boro stated:

> We agree to install only (furnished by others) air outlets, fans, air conditioning equipment (50% labor) automatic dampers, sound traps.
>
> We take exception to the following: removals of ductwork, cutting, patching, painting, housekeeping, pipe sleeves, testing and balancing, fin-tube enclosures, plenums for Carrier units (supply outlets) . . . .

On October 18, 1973, the erasure of the Carrier Moduline units from the drawings of the Van Etten job was discovered. Joseph Reyes, the president of Acme Climate Control Corporation, testified that Ted Johannsmeyer, a sketcher employed by Three Boro and a member of Respondent, told Reyes that he had erased the Carrier units from the drawings. Upon being informed of the problems on the Van Etten job, Contardi called Pasquinucci. Contardi's account of the telephone conversation, which the Administrative Law Judge credited was:

> Contardi: Dan I hear there's trouble on the Van Etten job. Dan, I understand you have refused to let them sketch the job.
>
> Pasquinucci: That's so.
>
> Contardi: Dan, are you, as a union representative, telling me, as representative of Carrier, that you will not permit this unit to come in, into New York?
>
> Pasquinucci: That's so.
>
> Contardi: Well, you know what this is going to mean.
>
> Pasquinucci: That's so.

Carrier filed the charge in Case 2--CC--1296 on October 25, 1973, based on the events concerning the Van Etten job. However, the parties continued

to attempt to resolve the dispute without litigation. On November 13, 1973, Contardi and other Carrier spokesmen met with Respondent's officials. At this meeting Pasquinucci told the Carrier representatives that "he could not permit the unit to come in [to New York]." On December 27, 1973, Carrier filed the charge in Case 2--CE--66.

In January 1974, Columbia Presbyterian Hospital entered an agreement with H. Cohan Contracting Corporation to perform all the mechanical work on its Babies Hospital Addition, in accordance with the building specifications prepared by architects and consulting engineers. The specifications called for the installation of Carrier's 37AF air terminal units, including plenums as fabricated by Carrier. Cohan confirmed the purchase order with Carrier for the 37AF units with plenums installed on May 29, 1974. On or about June 11, 1974, Cohan subcontracted certain sheet metal work on the project, including installation of the Carrier moduline units as specified, to General Sheet Metal, Inc. General is a member of SMACNA and is bound by the standard form agreement between that association and Respondent.

Meanwhile, in March 1974, Pasquinucci and Contardi tentatively agreed that Respondent would accept Carrier's moduline units as factory fabricated in consideration for which Carrier would withdraw the instant unfair labor practice charges and promote the moduline units so as to provide additional sheet metal work. This agreement was not executed due to the upcoming union election which Pasquinucci lost to Robert Stack. On July 19, 1974, Contardi met with the newly elected president, Stack, to discuss the agreement made with Pasquinucci. After reviewing the situation, Stack told Contardi that Respondent had decided to "insist that [Carrier] go along with the agreement as written."

Respondent filed charges against General under the SMACNA agreement on November 7, 1974, and requested a hearing and determination by the Joint Adjustment Board.[6/] The grievance charged that:

> General is in violation of our Collective Bargaining Agreement, Addendum "B", Part II, last unnumbered paragraph, by permitting and for accepting work covered by our Agreement---fabrication of plenums---involving the Carrier Moduline Unit, for installation at the Presbyterian Medical Center, Babies Hospital, (168th Street and Broadway New York City) to be performed by persons who are not within the bargaining unit covered by our Agreement, rather than by its journeyman and apprentice sheet metal workers.

Respondent proposed that General pay the sum of $2153.60 to the Local 28 Sick Dues Relief Fund, representing the loss of man hours caused by General's alleged violation. As a result of this claim, General ceased the installation of the Carrier units at the Babies Hospital site. The work was not resumed until Carrier agreed to reimburse General for the amount claimed by Respondent.

Discussion

As noted, the Administrative Law Judge found that the presentation to and adoption by the general membership on June 21, 1973, of the executive board resolution that no allowances be made in the collective-bargaining agreement for the moduline units, constituted a violation of Section 8(b)(4)(i)(B). We disagree. Respondent's executive board simply phrased the proposition to be decided, made a recommendation, and submitted that recommendation for acceptance or rejection. The resolution merely asked the union members to decide whether their contractual rights should be waived. The Board has held that a union agent's inquiry

6/ The Joint Adjustment Board, a body consisting of an equal number of representatives of the Union and of the Employer Association, is established by the collective-bargaining agreement for the purpose of resolving grievances arising out of the interpretation or enforcement of the contract.

of neutral employees as to whether they would leave the job if requested by the union, so as to put pressure on the primary employer, was not inducement and encouragement within the meaning of Section 8(b)(4)(i)(B) of the Act.[7/] The resolution here is even less interpretable as a "request or suggestion" that the union members refuse to perform services as there is no suggestion in the resolution that the contract would be enforced by proscribed economic action.

The Administrative Law Judge also found that Pasquinucci's statement to Carrier representatives on November 13, 1973, and Stack's statement to Contardi on July 19, 1974, both to the effect that moduline units would not be allowed into New York City, constituted violations of Section 8(b)(4)(ii)(B). We cannot adopt those findings. The statements were no more than reiteration of Respondent's position that it would not relinquish its rights under the collective-bargaining agreement. There is no suggestion that Respondnet would attempt to enforce the agreement by means other than those provided by the agreement. Consequently, we find that these statements do not constitute "threats, coercion or restraint" within the meaning of Section 8(b)(4)(ii)(B), and that Respondent's efforts to enforce its collective-bargaining agreement did not violate Section 8(e).[8/]

With regard to the filing of the grievance against General Sheet Metal in November 1974, our decision in Associated General Contractors, supra, requires

7/ Local 139, International Union of Operating Engineers, AFL--CIO, (Fox Valley Construction Material Suppliers Assn., Inc.) 182 NLRB 72 (1970).

8/ The Respondent contends that in any event these statements do not violate Sec. 8(b)(4)(ii)(B) as they are directed to the primary party to the dispute. For the reasons discussed infra, we find it unnecessary to reach the primary-secondary employer issues inasmuch as we find the Respondent has not engaged in coercive tactics proscribed by the Act.

a finding that Respondent did not violate Section 8(b)(4)(B) [9] and that the contract as so applied did not violate Section 8(e). [10] By instituting the grievance proceeding against General Sheet Metal, the Respondent merely "sought to enforce certain provisions of [its] bargaining agreement against a party to that agreement through peaceful means provided by the agreement and by no other means." [11] As the Board stated in Associated General Contractors at 700:

> [A] contractual agreement, such as we have before us, for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute. Consequently, we find the Union's use of its contract in its dispute with Ohland did not constitute statutorily proscribed threats, coercion, or restraint.

As to the allegation that in violation of Section 8(h)(4)(i)(B) Respondent attempted to enforce its rights under the collective-bargaining agreements by inducing employees to refuse to perform work involving the Van Etten Drug Treatment

9/ The Administrative Law Judge found that the institution of the grievance proceeding constituted a violation of Sec. 8(b)(4)(B), following the reasoning of the Ninth Circuit Court of Appeals in Associated General Contractors of California, Inc., v. N.L.R.B., 514 F.2d 433 (C.A. 9, 1975). With all due respect to that court, we adhere to our decision in Associated General Contractors, 207 NLRB 698. The Administrative Law Judge also relies on Connell Construction Co., Inc., v. Plumbers & Steamfitters, Local 100, 421 U.S. 616 (June 2, 1975). That case is inapposite, inasmuch as it involved economic activity by a union to force a general contractor, whose employees it did not represent, to enter into a no-subcontracting agreement.

10/ The Administrative Law Judge found that the contract as written violated Sec. 8(e). No such violation was alleged. Moreover, we see no basis herein for making such a finding. We also disavow the Administrative Law Judge's discussion of purported violations of Sec. 8(e) based on events occurring more than 6 months prior to the filing of the unfair labor practice charges. Pursuant to Sec. 10(b) of the Act, these facts were not before the Administrative Law Judge for consideration as violations of the Act.

11/ Associated General Contractors of Calif., 207 NLRB 688, 699.

Center project, we conclude that the evidence is insufficient to sustain this contention. There is no direct evidence that union members employed by Three Boro were encouraged or induced by Respondent to refuse to perform services. Pasquinucci's response "That's so" to Contardi's query "I hear you have refused to let them sketch the job" was ambiguous, and cannot be interpreted as an admission that Respondent encouraged its members to refuse to work, since throughout this prolonged dispute Respondent has consistently relied on its contractual rights and remedies. Further, there is no evidence that Pasquinucci or any other agent of Respondent communicated to Johansmeyer, the employee who erased the sketches at that job, that he should engage in such conduct or any other conduct proscribed by Section 8(b)(4)(B).

The record also is devoid of evidence that Johansmeyer was an agent of the Respondent. It is well established that a union is not liable for the acts of its members in the absence of a principal-agent relationship. A union member's refusal to work, even though stemming from the union's position in a dispute with the employer, does not constitute a violation of Section 8(b)(4)(B) in the absence of evidence that the union is legally responsible for his conduct. [12]

As in Associated General Contractors and Kinstock Division, having found that Respondent has not resorted to the coercive tactics proscribed by the Act, we find it unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed.

12/ International Brotherhood of Electrical Workers, Local No. 43, AFL--CIO (Executone of Syracuse, Inc.), 172 NLRB 621 (1968). See also Local Union No.], International Brotherhood of Electrical Workers, AFL--CIO (Forest Electric Corp.), 205 NLRB 1102 (1973).

In view of the foregoing, we shall dismiss the complaint in its entirety.

ORDER

It is hereby ordered that the complaint, as amended, be dismissed.

Dated, Washington, D.C. FEB 5 1976

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1437

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO,
Petitioner,
v.
CARRIER AIR CONDITIONING COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR CARRIER AIR CONDITIONING COMPANY IN OPPOSITION

KENNETH C. MCGUINESS
ROBERT E. WILLIAMS
MCGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Carrier Air Conditioning Company

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

INDEX

AUTHORITIES CITED

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BRIEF FOR CARRIER AIR CONDITIONING COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is reported at 547 F.2d 1178. The decision and order of the National Labor Relations Board (Pet. App. 31a-44a), including the underlying decision of the Administrative Law Judge (App., *infra*, pp. 1a-42a) are reported at 222 NLRB 727.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The petition for writ of certiorari was filed on April 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals was warranted in concluding that the Union's reaffirmation and enforcement of penalty provisions in its agreements with New York area sheet metal contractors for the stated purpose of keeping Carrier's Moduline air conditioning units out of the New York construction market violated Sections 8(e) and 8(b)(4)(ii)(B) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth in the petition at pp. 3-4.

STATEMENT

A. Background

The facts are fully set forth in the court of appeals' decision (Pet. App. 5a-12a). Briefly, since the mid-1960's, Petitioner (the Union or Local 28) has maintained a boycott against Respondent Carrier's factory-fabricated Moduline air conditioning units. The boycott has been implemented through various means over the years, but principally through enforcement and threatened enforcement of restrictive clauses in the Union's labor contracts with New York

area sheet metal contractors.[1] The Union has, with the contractors' acquiescence, consistently interpreted those clauses to proscribe installation of Carrier's Moduline units by signatory contractors' employees unless the plenum portions of the units are made in a New York area sheet metal shop employing Local 28 members. (Pet. App. 16a, n. 8).

The Union has repeatedly sought Carrier's agreement to allow fabrication of the plenums in New York shops, but with only a few exceptions arising out of efforts to settle this dispute, Carrier has refused because of the inability of the local shops to meet quality and performance standards. (Pet. App. 35a-36a). Throughout the dispute, Union officials have told Carrier that unless it would agree to their demands for the plenum fabrication work, the Union would not allow Moduline units "to come into New York." (Pet. App. 8a, 11a, 37a-39a).

B. The Union's Violations of the Act

In 1973, the Union's executive board adopted, and its members approved, a resolution that "no allowance be made in the c.b.a. [collective bargaining agreement] at all to allow the dual Moduline Mixing Box in the New York city area." (Pet. App. 37a). Later that year, when a Union member employed as a sketcher on the Van Etten Drug Treatment Center project erased the Moduline units required by the project specifications from the drawings for the job, the president of Local 28 told Carrier's district manager that the Union had "refused to let them sketch

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[1] The relevant contract clauses are set forth in the court of appeals' decision. (Pet. App. 6a, n. 3).

the job" and would "not permit this unit to come in, into New York." (Pet. App. 11a, 38a). Unfair labor practice charges filed as a result of these incidents led to settlement discussions in late 1973 which concluded unsuccessfully with the Union's president again telling Carrier that "he could not permit this unit to come in." (Pet. App. 39a).

In early 1974, architects for the new Babies Hospital Addition to Columbia Presbyterian Hospital in New York specified the use of Carrier Moduline units in that project. These specifications were incorporated in the contract between Columbia Presbyterian and H. Cohan Contracting Corporation covering all the mechanical work for the project, and Cohan duly ordered the Modulines as specified. Thereafter, Cohan subcontracted certain sheet metal work, including the installation of the Moduline units, to General Sheet Metal, Inc., whose employees are represented by Local 28 and covered by the labor contract in issue here. (Pet. App. 11a).

The Union subsequently filed charges against General with the contractual Joint Adjustment Board, alleging that General had violated the restrictive clauses of the labor contract by agreeing to install the Modulines. The remedy proposed by the Union was that General pay $2153.60 into the Local 28 Sick Dues Relief Fund. General thereupon ceased installation of the units and did not resume until Carrier agreed to reimburse it for the amount demanded by the Union. (Pet. App. 11a).

C. The Proceedings Before the Board

The complaint issued by the NLRB's General Counsel alleged that the Union's reaffirmation and enforcement of the restrictive clauses of its agreement with General and other contractors as against the Carrier units violated Sections 8(e) and 8(b)(4)(ii)(B) of the Act. The incidents noted above involving the executive board's resolution and the erasure on the Van Etten sketches were alleged as additional violations of 8(b)(4)(i) and (ii)(B).

The ALJ found that the Union had violated the Act as charged. Crediting the General Counsel's evidence, he concluded that the Union's contract-enforcement efforts in this case were calculated to "influence the business decisions of the hospital builders" at the Van Etten and Presbyterian Hospital projects and to cause Carrier to surrender its right to fabricate the plenum portion of the Moduline units "to others with whom Local 28 has a collective bargaining agreement . . . ." (*Infra*, pp. 35a, 37a). The ALJ found several indicia that the Union had acted with an illegal secondary objective. First, he noted various direct statements by Local 28 officials to Carrier representatives evidencing an objective vis-a-vis Carrier; secondly, he found that the sheet metal contractors against whom the Union enforced its restrictive agreement had "no right to control" the decision whether Modulines would be used on the projects in question; and thirdly, he found that fabrication of Moduline plenums was not work traditionally and historically performed by Local 28 members, because, *inter alia*, the "Carrier Moduline is a new and different product . . ." (*infra*, pp. 33a-35a). As to the

means used by the Union to enforce the boycott, the ALJ found that several acts, including the filing of charges against General leading to the payment of the $2,153.60 penalty, constituted prohibited coercion. He also found that the Union had induced members not to handle Modulines in violation of Section 8(b)(4)(i)(B) through the presentation and adoption of the resolution not to allow Modulines in New York. (*Infra*, pp. 38a-39a).

The Board reversed the ALJ and dismissed the complaint, principally on the ground that no coercion within the meaning of clause (ii) of Section 8(b)(4) had been shown. In so holding, the Board stated that it found it "unnecessary to reach the secondary-primary employer and work preservation issues on which the Administrative Law Judge passed." (Pet App. 43a). The Board further reasoned that the resolution adopted by the Union was not an illegal inducement, since it "merely asked the union members to decide whether their contractual rights should be waived." (Pet. App. 40a).

D. The Court of Appeals' Decision

The court of appeals reversed the Board's decision as to the 8(e) and 8(b)(4)(ii)(B) allegations of the complaint and remanded the case to the Board "for proceedings not inconsistent with [its] opinion." (Pet. App. 29a).[2] Noting that the Union had conceded before the Board "that its principal dispute was with Carrier," the court found that the Union's application of the restrictive clauses in its agreements

[2] The court affirmed the Board's dismissal of the Section 8(b)(4)(i)(B) allegations.

with the contractors to apply indirect leverage against Carrier embodied a clearly secondary objective. The court found it unnecessary to remand the case to the Board for further findings on the "primary/secondary and work preservation questions," because in its view the Board had reached these questions, "albeit implicitly," and further findings would be "of little assistance" in the circumstances presented. (Pet. App. 17a and n. 9).

With respect to the issue of coercion, the court found that the "fines authorized by the agreement here plainly were applied, or were threatened to be applied, in a way that gave the Union economic leverage over the subcontractors," and that "as applied to the individual subcontractor, the fines were unquestionably coercive . . . ." (Pet. App. 28a). The court rejected Board counsel's argument that the contractual Joint Adjustment Board procedure utilized here was "not economic retaliation but an agreed upon arbitral procedure for compensation for a breach of contract." (Pet. App. 23a). The court noted that the Board itself had not taken that position and that, on the facts, any comparison of the procedure used here with "bona fide arbitration" could not be sustained. (*Ibid.*).

ARGUMENT

The decision of the court of appeals is correct and not in conflict with other decisions. No issue warranting review by this Court is presented.

1. Petitioner contends that the court of appeals, in determining that a remand for further Board consideration of "the primary-secondary and work preservation issues" was unnecessary, departed so far

from accepted procedures on review of administrative agency decisions as to require "exercise of this Court's power of supervision." (Pet. 14). The contention is without merit.

Initially, we are not aware, and the petition fails to demonstrate, that the fault which Petitioner finds with the procedure followed by the Second Circuit in this case poses any recurrent problem in the administration of the Act, much less a problem of such magnitude as to call for this Court's intercession. The contrary is clearly suggested by the fact that the agency primarily responsible for enforcing the Act has decided not to request further review in this case.

Nor does the one case on which Petitioner relies in this regard, *N.L.R.B.* v. *Enterprise Ass'n, Local 638*, —— U.S. ——, 97 S. Ct. 891, 905 (1977), when considered with the Second Circuit's decision herein, show a pattern of procedural error by the courts of appeals which this Court must exercise its supervisory power to correct. The procedural problem this Court pointed out in *Enterprise* was that the D. C. Circuit had reweighed the facts and drawn its own factual inferences when the Board's contrary fact findings were supported by "substantial evidence on the record considered as a whole." 97 S. Ct. at 905. No such departure from the statutory standard of review occurred in this case; the court of appeals did not set aside any of the Board's findings of fact nor draw inferences contrary to the Board's. Furthermore, this Court granted review in *Enterprise* to resolve "an apparent conflict between the circuits" (97 S. Ct. at 896), not to exercise supervision over

an appellate court's departure from the proper procedure on review in one case. Consequently, *Enterprise* fails to illustrate that such procedural error poses the serious sort of problem which would, in itself, warrant this Court's attention.

Moreover, the Petition fails to demonstrate that the procedure followed in this case was, in fact, improper. The court of appeals did not reject the necessity for agency findings with respect to the lawfulness of the Union's object. Rather, it simply rejected the necessity for a remand for further agency proceedings on that issue in the circumstances of this case. Thus, Petitioner's contention actually amounts to no more than a quarrel with the court's conclusion that the ALJ's findings of fact concerning the secondary object of its boycotts "were essentially accepted by the Board" and that "additional findings would be of little assistance." (Pet. 16-18). We submit the court of appeals was well warranted in concluding, based on the Board's treatment of the ALJ's findings, that "the Board did reach the questions, albeit implicitly" (Pet. 17a, n. 9), and that the Union's contrary argument is without merit. But in any event, whether that conclusion was justified or not is a narrow factual question with significance only for the immediate case and not an issue deserving of this Court's attention.

Petitioner goes on to argue that, by concluding without a remand that the Union's object in this case was secondary, the court of appeals improperly foreclosed Board consideration of an "important federal question"—to wit: "the precise parameters of the work preservation doctrine" where, as here, a

"new and different product" is involved. (Pet. 19). But that issue would not, in any event, have been reached in this case in the wake of this Court's decision in the *Enterprise* case, *supra*. For *Enterprise* requires the conclusion that the Union here had a secondary object, whether or not the fabrication of Moduline plenums was "work traditionally and historically performed by members of the Union." (*Ibid.*).[3]

In *Enterprise*, this Court held that a union's efforts to force a jobsite subcontractor to cease handling prefabricated products specified by the general contractor or developer of the project had a secondary object even though the union was seeking "the kind of work traditionally performed by its members." 97 S. Ct. at 903-904, n. 16. The work in question in that case was cutting and threading of internal piping for Slant/Fin Climate Control air conditioning units; here it was fabrication and assembly of plenums for Carrier Moduline units. But in each case, the specific work the union sought was "work that it never had and that its employer had no power to give it, namely, the piping [or plenum fabrication] work on units specified by any contractor or developer who prefers and uses prepiped [prefabricated] units." *Ibid. Enterprise* establishes that

[3] This case was decided a month before *Enterprise*, when the validity of the so-called "right to control" test for determining whether an object of a product boycott is secondary had not yet been decided. Accordingly, although the Second Circuit noted that the sheet metal subcontractors here lacked the right to control the work the Union sought, it expressly declined to decide the case on that basis, finding other "ample" evidence of a secondary object. (Pet. App. 19a, n. 12).

any product boycott carried out under such circumstances is secondary because its "tactical objects" necessarily include influencing persons other than the employer of the union's members. *Ibid.* Accordingly, *Enterprise* would unquestionably require a finding of a secondary object in the circumstances of this case,[4] and Petitioner should not be heard to complain simply because the court of appeals found such an object without remanding the case for further agency proceedings.

2. The remaining issue which Petitioner seeks to raise—i.e., "whether a union, prohibited under *Enterprise* from picketing to enforce a work preservation clause, is also precluded from asserting a claim for breach of that clause against the contracting employer pursuant to the grievance and arbitration machinery of a collective bargaining agreement" (Pet. 21)—is not presented by this case.[5] For as the court of appeals found, "the contract here did not involve the equivalent of bona fide arbitration." (Pet. App. 23a).[6] The court went on to explain:

[4] As the court of appeals noted (Pet. App. 17a), "The Union conceded, before both the ALJ and the Board, that its principal dispute was with Carrier, but, rather than applying its leverage directly against Carrier, the Union relied on the no subcontracting clause in its agreement with the [sheet metal contractors] Association to keep Modulines out of New York."

[5] It should be noted, however, that Petitioner's formulation of this question tacitly concedes the correctness of the Court of Appeals' finding of a secondary object. For unless the Union's application of the contract in the circumstances of this case had a secondary object, picketing would not be foreclosed under *Enterprise*.

[6] Pages 23a and 27a are transposed in Appendix A to the petition.

> The contractual procedures under which General paid a fine—and pursuant to which other subcontractors were doubtless deterred from accepting work involving Modulines, thus enabling the Union to effectuate its repeated threat to Carrier to keep Modulines out of New York—were to be implemented by the 'Joint Adjustment Board' of 24 members, half from the Union, half from the subcontractors' association. The factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute, were conspicuously absent here. (Pet. App. 23a, 28a).

In these circumstances, the court of appeals correctly concluded that the question "whether resort to bona fide arbitration procedures would constitute unlawful coercion" was not present and did not purport to decide it. Accordingly, this case does not present a vehicle for this Court's consideration of that issue.

Furthermore, even if the Second Circuit's holding here could be construed to apply broadly to any enforcement of work preservation clauses through contractual grievance procedures, the holding would not conflict with decisions of other circuits or with established principles of federal labor law. Every court that has ruled on the precise question has held that assessment of monetary penalties through contractual grievance machinery constitutes a form of economic coercion within the meaning of clause (ii) of Section 8(b)(4) of the Act. See the decision below and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975); and *cf. Danielson* v. *Int'l Org. of Masters, Mates and*

Pilots, 521 F.2d 747, 753 (2nd Cir. 1975) ("the obvious purpose of the damage provision is to coerce . . ."), and *Acco Construction Equipment, Inc.* v. *N.L.R.B.*, 511 F.2d 848, 853 (9th Cir. 1975) (assessing fines under contractual grievance procedure "constitutes a form of coercive economic pressure not judicial in nature."). And, as the court below noted, these holdings are solidly supported by the legislative history of the Act and previous cases interpreting the statutory terms "coerce or restrain." (Pet. App. 24a-28a).

There is no conflict in the circuits on this point. Neither of the cases which Petitioner cites in its attempt to show such a conflict involved assessment of monetary penalties through contractual grievance mechanisms. The method of enforcement at issue in the *Enterprise* case was a simple refusal to install the boycotted product. Consequently, any reference in the D.C. Circuit's opinion in that case to other means of enforcement is dictum.[7] Nor is there any conflict between the Fourth Circuit's decision in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323, 327 (1973), and the Second Circuit's decision here. In the cited portion of the *Koch* decision, the Fourth

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[7] Petitioner's reliance on statements in the D. C. Circuit's opinion in *Enterprise* to show a conflict with the Second Circuit's decision here is questionable, moreover, inasmuch as this Court reversed the D. C. Circuit's decision and thoroughly rejected its reasoning in that case. At the least, the D. C. Circuit should be given the opportunity to reconsider the views it expressed in that case and decide what portions of its underlying reasoning, if any, remain valid in light of this Court's decision, before being presumed to adhere to any of its earlier pronouncements.

Circuit simply observed that, although the work preservation clauses of a union's agreement with one contractor could not lawfully be extended to achieve a tactical object beyond that contractor, the clauses themselves were not automatically "nullif[ied]," but "remained available for appropriate application." 490 F.2d at 327. Nothing was said about the means by which such agreements could be enforced. Rather, the court was merely expressing the same proposition stated by the Second Circuit in this case—i.e., that even though enforcement of a work preservation agreement may be secondary and unlawful in some factual contexts, "[i]n its other applications, the same agreement may retain its validity." (Pet. App. 14a).[8] Thus, instead of a conflict, the cases reveal only harmony with the views expressed by the Second Circuit.

Contrary to Petitioner's final contention, the decision below does not hold that an employer signatory to a work preservation agreement "may breach its contractual commitments with impunity," (Pet. 28), or that no "mechanism exists for enforcement by a union" of such a contract. (Pet. 25). Rather, the court of appeals recognized, as did the courts in each of the cases discussed above, that the legality of the union's contract enforcement effort depends on whether, in all the circumstances, the tactical object of the effort is to influence the immediate, signatory employer or to influence another, "elsewhere." If it is the latter, the agreement is secondary in that ap-

[8] The Ninth Circuit expressed the same view in *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, *supra*, 514 F.2d at 439.

plication under the test this Court announced in *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 644 (1967), and recently reaffirmed in *N.L.R.B.* v. *Enterprise Assn, supra*, 97 S. Ct. at 903-904 and n. 16. And in such circumstances, Section 8(e) expressly declares the agreement to be "unenforceable" by any means. Nothing in the Act or in the national labor policy requires that unions be afforded an "alternative mechanism" for enforcing work preservation clauses for such secondary, tactical purposes.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH C. MCGUINESS
ROBERT E. WILLIAMS
MCGUINESS & WILLIAMS
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Carrier Air
Conditioning Company

May 16, 1977

APPENDIX

Decision of the Administrative Law Judge

JD-406-75
Bronx, New York

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 2-CC-1296

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY,
A DIVISION OF CARRIER CORPORATION

Case No. 2-CE-66

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY,
A DIVISION OF CARRIER CORPORATION

and

THREE BORO SHEET METAL AND
VENTILATING CO., INC.,
Party to the Contract

Raymond P. Green, Esq., for the General Counsel, N.L.R.B.

Sol Bogen, Esq., New York, N.Y., for Respondent Local 28.

Kenneth C. McGuiness, Esq., and *Robert E. Williams, Esq.*, both of Washington, D. C., for Carrier Air Conditioning Co.

William Rothberg, Esq., New York, N.Y., for intervenor, Sheet Metal and Air Conditioning Contractors Assn., New York City Chapter.

DECISION

Statement of the Case

James V. Constantine, Administrative Law Judge: This is an unfair labor practice case litigated pursuant to the provisions of Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). It was commenced by a consolidated complaint issued on February 28, 1974, by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director for Region 2. That complaint is based on a charge filed on October 25, 1973, and one filed on December 27, 1973, by Carrier Air Conditioning Company, herein called Carrier. Said charges and the complaint name Sheet Metal Workers International Association, Local 28, AFL-CIO, herein called Local 28, as the Respondent, and the complaint names Three Boro Sheet Metal and Ventilating Co., Inc., herein called Three Boro, as Party to the Contract.

In substance, said complaint as amended at the hearing alleges that Respondent violated Section 8(b)(4)(i) and (ii)(B) and 8(e), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent, also called Local 28 herein, as answered, admitting some allegations of

the complaint but denying that any unfair labor practices were committed. On November 18, 1974, Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., herein called the Association, was permitted to intervene as an interested party.

Pursuant to due notice this case came on to be heard, and was heard before me, at New York, New York, from March 10 to 14, both inclusive, and April 15, 1975. All parties were represented at and participated at the hearing, and had full opportunity to introduce witnesses, file briefs, and offer oral argument. Briefs have been received from the General Counsel, Carrier, and Local 28. Respondent's motion to dismiss was denied.

Upon the entire record in this case, and from my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. As to Jurisdiction

Carrier, a division of Carrier Corporation, a Delaware corporation, is engaged in the United States in manufacturing, selling, and distributing air-conditioning equipment and related products. During 1973, a representative period, Carrier sold and distributed products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from its place of business in interstate commerce directly to States other than the States in which it is located. I find that Carrier is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7) of the

Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Local 28 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *General Counsel's Case*

A. C. Contardi, Carrier's district manager for its machinery and systems division which covers metropolitan New York, testified substantially as follows: In such division Carrier "primarily operates in the construction and engineering phases" of refrigeration, heating, and "the entire line of air conditioning." When the owner of a building needs such equipment, Carrier works with the owner's architect and the owner's mechanical engineer "in the design of this equipment." As a result, Carrier's "equipment is part of the design, included in the specifications . . . so that when the job is bid by the owner through general contractors, we will get a fair chance to bid competitively."

After a contractor bids on a job, Carrier deals with contractor "to sell them the equipment, which meets the specifications, which is part of the design." A 37P unit is "a Moduline terminal device which controls the air, which varies the volume of the air which is discharged into the room." (See G.C. Exh. 2, app. A.) Another type of Moduline unit is in General Counsel's Exhibit 2, appendix B. 37P units have been manufactured by Carrier since 1963.

Carrier's 37A and 37P units are manufactured in Tyler, Texas, and prefabricated there. In 1966 and 1967, Carrier attempted to market the 37P unit in the New York City area. At that time Carrier showed such a unit to President Farrell and Mulhearn of Local 28. Said officials of Local 28 said that such unit "could not come into New York," but if "the so-called plennum [sic] section [thereof] should be made in [a] New York [shop, a Local 28 affiliated shop] then the unit could come in." Thereafter Carrier did supply such units for some buildings in the New York area. Farrell told Carrier that the unit "could not be installed, the lower section would have to be made in New York in a Local 28 shop . . . the fuser plate . . . and the plennum section [should be] made locally." Apparently Farrell's request was not honored by Carrier.

Later Carrier was "brought up on charges within" the Mechanical Contractors Association, to which it belonged, for making the above part of the unit away from New York. Farrell, who attended, complained that Carrier was "fabricating this stuff in a nonunion shop down in Texas," and stated "the unit as made would not come into New York." In January 1967, Carrier again met with Farrell. A "deal was consummated" to let Carrier proceed with two New York jobs it was supplying in return for Carrier's "proceeding to attempt to design a unit that would fulfill [Farrell's] requirements."

A few months later Carrier supplied the unit in the New York police office building. Farrell objected to Carrier as to the design of the job because, among other things, "they were using the Moduline unit as

designed in Tyler, Texas." Farrell also claimed that Carrier was not living up to the above "deal" which it made with Farrell. Ultimately they came to an agreement. (G.C. Exh. 2, app. G.) Said agreement in part provides that "Carrier . . . are presently developing a system of the terminal which would make possible the manufacture of the plennum [sic] by the Local" i.e., Local 28. As a result of said agreement Triangle Sheet Metal Company, which has a collective-bargaining contract with Local 28, received an order from New York City to provide the plenums for the police office building.

Following October 1967, when the foregoing agreement was entered into, Carrier made efforts to market the 37P units as redesigned in New York City, but "just couldn't sell the unit. . . . It was not economically feasible, it would not sell." So in 1970 Carrier introduced its 37A unit. This unit was manufactured in Tyler, Texas. In August 1970, Farrell requested Contardi of Carrier to abide by the agreement (G. C. Exh. 2, app. G), so that the plenums on 37A units would be manufactured in New York City. Contardi replied that Carrier had been unsuccessful in marketing the 37P unit, and that the 37A unit as manufactured by Carrier "had more appeal to the industry, because it's narrower." He also informed Local 28 on this occasion that "we were not able to fulfill what we had talked about previously about making the plennum [sic] section in New York and we asked for consideration." Farrell took it "under advisement" but, until he died in 1972, Farrell "maintained his old position. He did not change."

After Farrell passed away, he was succeeded as president of Local 28 by Pasquinucci. Contardi soon

met with Pasquinucci and informed the latter that Carrier "couldn't make the unit as proven by evidence. We hadn't sold the job in several years." Then Pasquinucci answered he would appoint a committee to study the problem and come up with a recommendation, but that "until we had some kind of understanding" Carrier "could not bring the unit in." The unit as made was unacceptable in New York.

Pasquinucci did appoint such a committee and Contardi appeared before it in September 1972. Contardi demonstrated to them with an actual plenum section. He demonstrated to them that the way Local 28 wanted things done "they could see why it [the plenum made in New York] was leaking, they could see why we had the problems and that it was a bad deal." He "showed them how and why it leaked" when the plenum was manufactured in the New York area. Later the Local 28 committee made a recommendation which was presented to its executive board and gave Contardi a copy thereof. (G.C. Exh. 2, app. I). Said committee recommended "acceptance of Carrier Moduline variable system factory fabricated, leak tested, and calibrated."

In late November 1972, Contardi spoke to Pasquinucci, asking the latter "what he was going to do, inasmuch as he didn't get it by the executive board." Pasquinucci "felt this unit should be admitted to New York" as fabricated in Tyler, Texas, notwithstanding that the Local 28 executive board disagreed with him. In early 1973 Pasquinucci had one of the committeemen "make a presentation to the membership [of Local 28] at one of the union meetings in an effort to sell the membership on the idea" espoused by Carrier. But the membership turned down "the idea."

In August 1973, Carrier received an order for 37A units from its distributor, Carlton Stewart, for a job at the Van Etten Drug Treatment Center, as the architect and the engineer on this job and decided "to put Moduline on the job." Carrier's Baltimore office worked with said architect and engineer "for the design of the job." Three Boro was the sheet metal contractor on said job. In October 1973, Contardi complained to Dan Pasquinucci of Local 28 that Dan "had refused to let them sketch the job," and that Dan "will not permit this unit to come into New York." Dan replied. "That's so." Such sketching was to be performed by a union mechanic who was a member of Local 28. Consequently a charge under Section 8 of the Act was filed by Carrier against Local 28.

In November 1973, Contardi and other representatives of Carrier met with Pasquinucci to "discuss the problem." Pasquinucci insisted that he "could not permit the unit to come in and suggested that [Carrier consider] sending into New York the cut pieces of the unit, deliver them to some shop in New York, which could take the cut pieces and put them together and make the units." Pasquinucci further stated that ultimately, after Local 28 men "got the experience, . . . the entire unit would be made in New York." Later Contardi informed Pasquinucci that Carrier "would not bring any units in for fabrication in New York."

Then in January 1974, Carrier shipped seven 37A units to the Van Etten Drug Treatment Center, and the remainder in February. In February 1974, Local 28 and Carrier arrived at an agreement that the Van Etten job should go ahead without interruption, that

Carrier would by March 15 "prepare an outline of what had been [agreed upon] in writing," and "it was understood we would not sign it until July 1st." Carrier did prepare such outline.

In May 1974, Pasquinucci discussed with Contardi a job at Presbyterian Hospital. Pasquinucci suggested he should reactivate the Local 28 committee, mentioned above, and that Contardi meet with it. Contardi met with that committee in late May and attempted to convince it that the plenum "was a minor portion of the work that they lost. The unit would . . . definitely increase the total volume of work for them," i.e., for Local 28. Apparently, no agreement was reached on such issue.

On July 1, 1974, Stack defeated Pasquinucci in an election for the presidency of Local 28. Contardi met with Stack on July 19. Stack promised to review the situation with the executive board of Local 28 "and others" and would then "have an answer." A few days later Stack informed Contardi that Local 28 was "going to insist that [Carrier] go along with the agreement as written," i.e., "Local 28's agreement with the association."

On cross-examination, Contardi explained in detail how a plenum, as well as the entire unit of which it is a part, functions. Among other things, Contardi stated that the unit "can never work separate of the plennum . . . in order to give the guarantee that we give with that unit, we assemble part of the plennum with part of a section of the unit, called the control assembly." He also mentioned that a "plenum [is] used in practically every air-conditioning system, in one fashion or another."

Further, on cross-examination, Contardi testified that members of Local 28 did work on some plenums in the past made in New York by employers having contracts with Local 28 but not on plenums of the type known as 37A and 37B. These latter types and the units of which they were a part have always been made by Carrier in Tyler, Texas. But President Farrell of Local 28 claimed that such plenums should be made in New York. Farrell also brought charges against Carrier before the Joint Adjustment Board that Carrier was "bringing in a unit that shouldn't be brought in here," and that this violated the contract between Local 28 and an association to which Carrier belonged.

Then in November Farrell claimed Local 28 members should make the plenum on Carrier's 37P unit because the plenum was a "customary, traditional item made by the [Local] 28 men." Later Carrier and Local 28 agreed that Carrier would attempt to design the unit to be made in two pieces so that the plenum would be made in New York. Up to then it was Carrier's position that the unit was one piece and the plenum, as part of that one piece, was to be made somewhere else than in New York.

Further, on cross, Contardi testified that on the police office building job Triangle Sheet Metal fabricated and provided the plenum using plans and specifications supplied by Carrier. Later Triangle claimed said plans and specifications were incorrect. This was settled by Carrier's paying Triangle $10,000 in addition to the regular contract price to "modify" said plenums. But Carrier made said payment only because it guaranteed to the New York police that said plenums would function and thus was responsible

for Triangle's errors in "not maintaining the tolerances" on such plenums. Such incorrect tolerances caused the units to be defective and to leak on the jobsite. So Carrier paid the $10,000 to Triangle "to modify the boxes so we [Carrier] could fulfill the guarantee." Finally, on cross, Contardi testified that, although by reason of Carrier's fabricating the unit some work would be lost by members of Local 28 in the New York City area, there would be additional work, such as "additional duct work," for such members by reason of their installing the unit which "would more than offset the loss of the plenums."

On redirect examination, Contardi testified that the air-conditioning units installed at the World Trade Center were sold by Carrier. Notwithstanding that the plenum for such units was manufactured in Tyler, Texas, members of Local 28 installed said units at the Center. Also, Carrier has sold similar air-conditioning systems, as well as other types of systems in the New York City area, and the units thereof, "literally hundreds of thousands," including their plenums, were manufactured in Tyler, Texas. Yet members of Local 28 installed those systems in the New York City region "without question or problems with respect to who was to perform the work or fabrication of any aspect of that."

Raymond Skorupa, an architect, testified essentially as follows for the General Counsel. He was employed by Isadore and Zachary Rosenfeld as a project architect from 1972 to December 1974. He produced the drawings and specifications on the Van Etten Hospital job. (G. C. Exh. 2, app. P and particularly pp. 15B-19 and 20). These call for the use of Carrier

Moduline 37A units because they were recommended by the engineering firm of Henkins and Anderson and thereafter the owner approved the installation of such units.

On cross-examination, Skorupa testified "as far as I was concerned, it didn't matter where the unit for the plenum [or Van Etten Hospital] was maufactured, any part of it . . . I didn't care where any of the pieces were manufactured, as long as they met the criteria in the specifications." Nor did the specifications provide who was to fabricate any of the components for the unit or where the unit or its three components were to be assembled.

Another witness for the General Counsel was Lawrence Sturgis. An adequate synopsis of his testimony follows. He is president of Advanced Control Corporation, which manufactures items for the heating, ventilating, and air-conditioning industry. From 1966 to 1973 he was executive director of the promotion fund of the sheet metal industry. Said fund is interested in increasing work opportunities for members of Local 28. Prior to that he was a consulting mechanical engineer. Such an engineer designs a system which "has optimum operating advantage keeping down the costs" in heating, ventilating air-conditioning, plumbing, and electrical work."

As executive director of the foregoing promotion fund, Sturgis cooperated with a Local 28 committee which was studying variable volume air-conditioning units, one of which was Carrier's Moduline unit. According to Sturgis, a sketcher in the sheet metal industry is one "who does the complete layout and background [of] the structural, architectural, and

to some extent the plumbing and piping . . . work, in a given project, where it applies to the ventilation industry." Sketchers are members of Local 28.

In the fall of 1972 he asked President Dan Pasquinucci of Local 28 to appoint a committee to study the variable volume system, and Pasquinucci did so. Later Pasquinucci indicated to Sturgis that he had read said committee's report and looked upon it favorably. Said report is in evidence as General Counsel's Exhibit 2, appendix I, and its stated purpose is "To Evaluate the Carrier Moduline Variable Volume Unit." Said committee recommended unanimously "acceptance of Carrier Moduline variable volume system, factory fabricated, leak tested, and calibrated." Pasquinucci told Sturgis that he favored the committee report but had to obtain the approval of the executive board of Local 28.

Later in the fall of 1972 Sturgis met with the executive board of Local 28. He argued that "the variable volume system [be] brought into New York" because it would "increase the net amount of work that would be done by members of Local 28." Members of said board then questioned Sturgis about the possible "loss of work opportunity by not manufacturing the plenum box that is attached to the unit." Admitting such loss Sturgis contended that if the plenum was not made in New York "the variable volume system would more than make up for that particular loss." But Sturgis later learned that the board turned down his recommendation.

In early 1973 the Joint Adjustment Board, a group consisting of labor and management, and Sturgis discussed the Carrier Moduline system. He urged said

board to "adopt a favorable policy towards" the variable volume systems.

On cross Sturgis testified that, to his knowledge, Local 28 "always" fabricated the plenum or the box in a unit. But he added that such plenums differed from those in a 37A "both in the controls that are placed inside the unit and the function that it serves." In his discussions with President Pasquinucci of Local 28 Sturgis agreed that a plenum was a box, but disagreed that it was a routine box and insisted that "the variable volume system was far more sophisticated as a unit than the normal plenum above a linear diffuser." However, it made no difference to Sturgis whether the components of the variable volume boxes were made in New York, Texas, "or any place else," or if the plenum was made in New York and the other parts elsewhere.

Additionally, on cross, Sturgis testified that he appeared before the Joint Adjustment Board, a group composed of employers and Local 28, to "modify or amend" his agreement, i.e., "to try to have them waive the claims that the work was done historically" by Local 28. (G.C. Exh. 2, app. W-1.) But on that occasion he contended before the Joint Board that "the variable volume unit [i.e., the whole unit, including the plenum box] is obviously a relatively new item in the industry. There is nothing historical or traditional about it. . . . I didn't ask that something historically and traditionally made by 28 be not made" by Local 28. Finally, on cross, Sturgis asserted that prior to the introduction of the Carrier Moduline unit Local 28 had not made a box which was cut and fabricated in such a manner that a

control and assembly, such as that used on a Carrier unit, could be attached; but there are now about 10 shops in the New York City area which are producing comparable boxes.

Howard Bretz, a member of Local 28 and a sheet metal draftsman for Triangle Sheet Metal, testified substantially as follows for the General Counsel. He is also a sketcher. A sketcher prepares shop drawings on the drawing board. About 6 years ago President Farrell of Local 28 appointed him to its research and review committee to make a study of variable volume systems. Such study, which was undertaken in 1972, was suggested by Larry Sturgis of the industry fund. Then said committee issued a unanimous report recommending "acceptance of Carrier Moduline variable volume system, factory fabricated, leak tested, and calibrated." (G.C. Exh. 2, app. I, p. 1.)

Such report was then presented to executive board of Local 28 on October 12, and again on November 21, 1972. On the latter date the said committee recommended that Local 28 accept Carrier's request that Local 28 waive a provision of said union's "standard form of union agreemnt to fabricate the boxes, the plenums." This recommendation would cause some loss of work to Local 28 members but would result in additional other work which would more than offset said loss of work. But the executive board made no decision respecting this proposal at that time. Said board met again on June 5, 1973, and further studied the problem. On this last occasion the board rejected the committee's proposal.

At a general membership meeting after said June 5 rejection, Bretz objected to acceptance of the board's

position, and recommended "two pilot jobs to see if this [the committee's proposal] was a workable solution." But the members at said meeting accepted the board's recommendations and rejected those of the committee.

Another witness for the General Counsel, Joseph Reyes, declared under oath substantially as follows: He is president of Acme Climate Control Corporation, which is engaged as a contractor in heating, ventilating, and air-conditioning. Acme received a contract on October 1, 1973, from Ormar Construction Company to work on the Van Etten Drug Treatment Center. (G.C. Exh. 2, app. R.) Subsequently, on December 6, 1973, Acme made a contract with Three Boro Company, the "Party to the contract" in the instant case (G.C. Exh. 2, app. T), but this contract was preceded by an understanding dated October 8, 1973.

Sometime in October 1973, Acme commenced performing work at the foregoing jobsite. Originally the sketches pertaining to Acme's work required the installation of Carrier's Moduline units. One day, following a conversation with Ted Johansmeyer, a sketcher on the job employed by Three Boro, and who was a member of Local 28, Reyes observed that the Carrier Moduline units had been erased from the tracing or sketch. Johansmeyer told Reyes that he had made said erasures. Reyes assumed that Johansmeyer had prepared the sketch originally with the Moduline units drawn in.

On February 15, 1974, Reyes wrote to Three Boro that "all of the Carrier Moduline units are ready for delivery . . . to the [Van Etten Drug Treatment

Center] job." (G.C. Exh. 16.) On February 21, 1974, Three Boro replied by letter to Acme that Carrier's Moduline units contained plenums "which is not in our proposal . . . of October 8, 1973," and that said proposal "is in conformance with our signed contract agreement with "Local 28. (G.C. Exh. 17.) Then on February 25, 1974, Acme wrote to Three Boro, "it is our understanding that all differences have been resolved between Local 28 and Carrier Corporation insofar as the installation of Carrier Moduline units for [the Van Etten Drug Treatment] job. . . . Based on this agreement you have agreed to proceed with the installation of these [Carrier] units." (G.C. Exh. 18.)

Acme's purchase order for such Carrier units is set out in General Counsel's Exhibit 2, Appendix 5. Said order involves, according to Reyes, complete units "with the plenum box attached." At no time did Acme make arrangements or agree to have any component part, such as the plenum, of the Carrier Moduline units to be fabricated "somewhere else" than Carrier, such as by Three Boro.

Daniel Fragnito, another witness for the General Counsel, gave testimony substantially as follows: He is Carrier's engineering section manager for the Moduline units manufactured in Tyler, Texas. The first 37P Moduline unit was installed in 1961 in a high school in Beaumont, Texas. In 1970 he visited Essex Sheet Metal Company's shop in the New York City area "to look at a plenum" in connection with a job involving Staten Island Community College in New York City. Essex, which recognizes Local 28 and has a contract with it, made a plenum for Car-

rier's Moduline unit. What he saw "didn't have a chance in the world of working" because it could not satisfactorily be "mated" with Carrier's Moduline unit, and he explained this to Essex.

Fragnito in 1969 provided a special design of the Carrier Moduline 37P unit for the New York police headquarters job. Triangle Sheet Metal Company called on him at Carrier's Syracuse, New York, laboratory, in December 1970, to "check out the installation procedure of the unit" in a "mock-up installation" of the unit. Such "mock-up" presented "some problems at the time of installation" which demonstrated "it was very difficult to insure . . . a proper . . . air seal." Further, he testified that on the Moduline 37A unit "it is much more difficult to put on [the plenum section] separately," i.e., "it is better for [Carrier] to produce the whole thing [in Tyler, Texas] than to have some of it produced by [Carrier] and some of it [the plenum] by someone else."

Continuing, Fragnito explained why it was almost necessary, and certainly better, for Carrier to make the plenum in Tyler, Texas, rather than have outsiders in New York fabricate it. In this connection, he mentioned that those in Tyler, Texas, including "supervisory and management people," fabricating such units receive special training to qualify them to manufacture such units, and that the plant there is specifically designed to manufacture units with the plenum included in the units. In fact, according to him, "it would be extremely difficult" to "mate the plenum boxes to the controls" if the plenums are manufactured outside of Carrier's Tyler, Texas plant."

Finally, on direct, Fragnito testified that patents cover Carrier's Moduline units 37A and 37P, and that the plenum cannot be produced in the "Local 28 shops" without obtaining permission from Carrier as the holder of such patents. The Staten Island job, the New York police headquarters job, and perhaps "one or two other minor jobs" had their plenums made by a manufacturer in the vicinity of New York City under a license from Carrier as the patent holder. Except for those jobs mentioned in the preceding sentence no other manufacturer than Carrier had made Moduline units 37A or 37P.

On cross, Fragnito testified that Carrier received complaints that the Moduline units installed on the New York police building job and the Staten Island job were not functioning properly. Also, on cross, he testified that the special training and equipment connected with Carrier's Tyler, Texas, plant could be effected elsewhere "as long as they were within the manufacturing plans of Carrier . . . and as long as [non-Carrier manufacturers] had the backup information and the backup personnel."

Further, on cross, Fragnito stated that on the New York police headquarters job all the parts of the unit, but the plenums were manufactured by Carrier in Tyler, Texas, that the plenums were fabricated by Triangle in the New York City area, and that Triangle assembled all of said parts at the jobsite to produce complete units. He gave the same answer with respect to the Staten Island job on which Essex installed the Moduline units, i.e., Essex fabricated the plenums and assembled the entire unit on the job, although Carrier made parts other than the plenums.

But, according to Fragnito, Triangle fabricated said plenums differently from the way Carrier did, so that complaints about leaks were received by Carrier. Such complaints were submitted to Carrier because it guaranteed the entire unit.

At this point in the hearing, the parties stipulated that Carrier Moduline units 37A and 37P are sold throughout the United States and that such units, including the plenum portion are installed as fabricated in Carrier's Tyler, Texas, factory by members of locals of Sheet Metal Workers International Association without objection, except in that area within the jurisdiction of Local 28. Examples of such installations are shown in General Counsel's Exhibit 8 with deletions therein for installations in New York City.

It was further stipulated that on or about March 3, 1975, members of Local 28 employed by General Sheet Metal, Inc., began installation of Carrier 37af Moduline units at Babies Hospital addition, pursuant to an agreement (G.C. Exh. 2, app. Y) between General Sheet and H. Cohan Contracting Corp.; that the Joint Adjustment Board on or about March 5, 1975, discussed charges (G.C. Exh. 2, app. aa) brought against General Sheet; that no final action was taken on the resolution (G.C. Exh. 2, app. bb) of Local 28 at said meeting or on any other disposition of said charges.

Then the General Counsel rested.

B. *Respondent's Defense*

Dan Pasquinucci was Respondent's first witness. His testimony may be condensed as follows: He is

now an organizer for Sheet Metal Workers International Association. Previous to that he was a business agent and then president of Local 28. He served as such president from April 1972, until June 30, 1974. In September 1972, he discussed Carrier's Moduline units with Larry Sturgis, the executive director of "the industry fund." Sturgis said he was interested in promoting such units in New York City as he felt "it meant an aditional amount of work for the membership of Local 28." Dan replied he was interested if it meant more work to the "shop men" of Local 28, "but it meant a modification of our collective-bargaining agreement" because "we had members of Local Union 28 fabricating a similar box" for the last 15 years. So Dan said that the Local 28 executive board would have to approve the Carrier Moduline unit because of the said provision in said union's bargaining contract. Dan promised to submit the question to the research and review committee of Local 28 for further consideration.

Later Dan submitted the issue to the aforesaid committee of Local 28. Said committee submitted a report to him recommending "acceptance of Carrier Moduline variable volume system." (G.C. Exh. 2, app. i.) He concurred in the committee's views, and presented such report to the executive board of Local 28, informing said board he went along with the committee's recommendation. He told the board that "it would bring extra work into Local Union 28 . . . [although] it was in violation of our [collective-bargaining] agreement." But the board disapproved the committee's recommendation that Carrier, and not employers having contracts with Local 28, fabricate the plenums. (G.C. Exhs. 5 and 6.)

Shortly after December 6, 1972, Dan informed Sturgis of the board's rejecting the committee's recommendation of Carrier's fabricating the plenum on Moduline units. Then Sturgis appeared before the board in February 1973, but after discussing the problem with him the board concluded it would adhere to its position but suggested that Sturgis present the problem to the Joint Adjustment Board.

Sturgis did appear before said joint board and suggested a "pilot project . . . to see if . . . it would bring more work into the Local." Local 28 representatives present promised to refer the question of a pilot project to their executive board. Such question was given to the said executive board about April 1973. However, such executive board later rejected said proposal of Sturgis. (G.C. Exh. 6.) Thereafter, Pasquinucci communicated to Sturgis the fact that such proposal had been rejected by the executive board.

In October 1973, Contardi called Pasquinucci to tell him that the sketcher on the Van Etten job had refused to sketch the job. Pasquinucci replied, "I was just going to live under my contract" but added that he "wasn't going to stop any jobs." Later, Pasquinucci met with Contardi in December 1973 to attempt to resolve their differences. But nothing was accomplished. Then Pasquinucci held another meeting with Contardi in February 1974, "to see if we couldn't resolve the Van Etten job." It was agreed, among other things, that "Carrier Corporation would withdraw from selling the Moduline unit until we had resolved our differences." On March 12 Contardi gave Local 28 a written proposal embodying a

solution of their differences. (G.C. Exh. 2, app. U.) Pasquinucci promised to submit this proposal to the executive board of Local 28 after July 1.

In May 1974, Pasquinucci told Contardi that he had been notified that some Carrier salesmen were promoting the Moduline unit on certain jobs in New York City, and added that he felt that this was in violation of their oral agreement made in February 1974. Contardi agreed to look into this.

Fred Zwerling, president of Triangle Sheet Metal Corporation and its subsidiary, Moduline Metal Corporation, testified substantially as follows as a witness for Local 28. Triangle performed, among other things, the air-conditioning work on the New York City police headquarters building. This included installing the Moduline unit 37P for such headquarters. At the time Triangle bid on said job "there was an understanding between Carrier, the City, the design engineer, and Local 28 that the plenum portion of the unit would be fabricated by Local 28 in New York City." So Triangle purchased the Moduline section of the unit from Carrier, and Triangle "manufactured the plenum to fit that unit."

Then Triangle fabricated said plenums in its plant at College Point, Queens, by employees belonging to Local 28. Triangle had made plenums "similar or compatible to this . . . many times" prior to this. "It was very simple sheet metal work." Then Triangle assembled at the jobsite the portion of the unit which Carrier furnished with the portion furnished by Triangle, using members of Local 28 for such purpose. Such assembling was "no more difficult or more complicated than many other jobs [Triangle] had done."

Triangle started the police job in 1970 and completed it in 1974. No unusual problems "with the operation or installation of these units were encountered."

Prior to installing the units Triangle ran some tests on them and discovered some leakage of air from the plenum Moduline combination which Zwerling claimed resulted from Carrier's improper fabrication. So Triangle called "this defect" to the attention of Carrier. See Resp. Exh. 4. Carrier advised Triangle how to correct this. See Resp. Exh. 5 and 6. However, this involved "additional expense and cost to Triangle." This cost was submitted to Carrier (See Resp. Exh. 7) and the latter made a "settlement" thereof. See Resp. Exh. 8. After the units were installed, they were tested "with respect to their air distribution in the unit and these disclosed that "the building was working satisfactorily, and accepted by the owner for occupancy." Carrier guaranteed the operation of that portion of the Moduline unit which it furnished.

On cross Zwerling testified that, prior to the police building job, Triangle never manufactured plenums for Carrier's Moduline units, and that "the only time that Triangle has ever fabricated plenums in relation to Carrier's Moduline unit was the Police Headquarters job." He also asserted on cross that his company has never installed any Carrier 37A model units at any place.

John J. Flannery, for 17 years president of J. J. Flannery, Incorporated, a sheet metal contractor, was a witness for Respondent. His testimony may be summarized as follows. Prior to this he was a sheet metal estimator of Howard Platter Co. for 5 years.

This latter position required him to prepare bids on heaters, ventilators, air-conditioning, and kitchen exhausts. J. J. Flannery, Inc., subcontracts work for mechanical contractors in the field of sheet metal work, outlets, sound traps, and the work "necessary to take care of the air side in a high pressure or low pressure air-conditioning job."

About 5 years ago J. J. Flannery, Inc., first "performed any work with regard to the Carrier moduline units" when it made 1300 or 1400 boxes for the Bache & Co. job in New York City but did not install them. Actually the boxes were fabricated for Alvord & Swift, the mechanical contractors on the Bache job. These boxes were "the plenum section from the top" on 37P units. Employees who were members of Local 28 drew the sketches and fabricated said boxes. In the past J. J. Flannery, Inc., has fabricated "similar" or "comparable" boxes "to this plenum."

J. J. Flannery, Inc., also, about 2 or 3 years ago, made about 30 or 40 Carrier 37P plenums for Alvord & Swift as part of the duct system at the Presbyterian Hospital's Harvest Pavilion. On this job Flannery, Inc., assembled at its shop the said plenums Carrier units which Flannery purchased without the plenums, and then installed the entire units with the plenums included therein at the jobsite. The plenums for these units on this job were fabricated and assembled and then the unit was installed at the jobsite by members of Local 28 employed by Flannery, Inc. Since said unit "was a new item and they [Carrier] were concerned about it [Carrier] checked it out and said it was fine."

Flannery, Inc., received no complaints from Carrier as to the plenums on the hospital job or from anyone as to the Bache job or the hospital job.

About a year and a half ago Flannery, Inc., received an order from Alvord & Swift to perform more of the same kind of plenum work at said Hospital's Vanderbilt Clinic. "It was all part of the same complex at Presbyterian Hospital." This involved the same unit, i.e., Moduline 37P of Carrier, and "essentially the same" plenum fabricated for the Harvest Pavilion. Said plenum was assembled as part of the unit, the remainder, i.e., all but the plenum, having been supplied by Carrier. Said units were assembled by members of Local 28 in Flannery's shop and then installed on the jobsite by members of Local 28. Said Vanderbilt job was tested and said test disclosed that "minor corrections as to the air quantity" had to be made. After said corrections were completed "the system was ultimately approved."

The foregoing jobs were the only ones on which Flannery, Inc., worked which involved Carrier's Moduline units.

On cross Flannery was unable to say whether the foregoing Bache job involved Carrier units, and "it could have been some other unit." Further, on cross, he averred that Flannery, Inc., never made a box or a plenum for a Carrier 37A unit. Finally, on cross, Flannery stated that he wasn't sure how many units his company installed on the hospital's Harvest Pavilion job.

Thomas Berrill, president of a sheet metal contractor, Lambert Sheet Metal Corp., testified for Respondent. He has been a dues-paying member of Local 28 since 1941. An abstract of his testimony follows: He is not familiar with the Carrier Moduline unit. Lambert Corp. did a job at Columbia Presbyterian Hospital installing Buensod's "variable volume system specified in that contract." Alternates to Carrier's Moduline units are those of Arastack and also of Buensod. The contract included a "reference to a Carrier Moduline unit or an alternate." Lambert "bid the alternate," which was Buensod's.

A variable volume system "is a system where you get through a thermostat a variable amount of air, or more air or less air as the occasion requires . . . it is done by a thermostat that controls the volume regulator." Carrier's Moduline units, Buensod's versa-trol system, and Aeronca's versa-trol system will perform that function. On a versa-trol system the plenum is attached to a "line diffuser, or a regular diffuser, and it is controlled automatically throughout the thermostat by air."

In Berrill's opinion the system of Buensod is similar to Carrier's, in that Buensod's has a plenum, "To [him] it looks very similar," although he had no experience in or knowledge in installing a Carrier unit. In his opinion "the plenum of the Carrier system [is] similar to the plenum in the Buensod system"; and although he described one difference, he was unable to state what other differences existed between the two systems. Members of Local 28 have fabricated Lambert's plenum boxes, as Lambert has a collective-bargaining contract with said union.

Lambert also has shipped variable volume units with plenum boxes to other jobs but did not install

them. On these occasions the contractor on the job installed such units. However, such units lacked diffusers, as "we don't make diffusers." But he did not know where such contractors obtained such diffusers for the variable volume units.

On cross Berrill stated that Lambert never fabricated a plenum which "had anything to do with the Carrier 37A or 37P unit." Also on cross he asserted that Lambert is the exclusive manufacturer in New York City of Buensod's plenums. Finally, on cross, Berrill testified that the specifications in the contract on the Columbia Hospital job "called for the Carrier Moduline Unit or an alternative." However, he did not know how an alternate to Carrier's unit was selected as the mechanical contractor, for whom Lambert was the sheet metal work subcontractor, made that decision.

Another witness for Respondent was Jack McKeogh, manager of Essex Metal Works. A summary of his testimony is set forth here. Essex performs sheet metal work, air-conditioning, and sheet metal fabrication installation. In 1970 Essex "performed work in regard to the 37P unit" of Carrier. It did so as a subcontractor to CDE Mechanical Contracting Company on the Staten Island Community College in New York. Essex furnished and installed plenums on this job. The "furnishing aspect consisted of "fabricating a sheet metal plenum, installing it on the module in the shop, and then delivering the module to the jobsite. The module was shipped to the Essex shop by CDE, which bought the same from someone whose name is not in the record.

While the module was in the Essex shop Essex drew sketches "of the application of the plenum to

module." See Resp. Exh. 10 for such a sketch or drawing. Then the plenum was fabricated in the Essex shop by its employees. Said employees were members of Local 28. After this the plenums were assembled on the module in the shop. A Carrier representative came to the shop "to approve the type of fabrication [Essex was performing] on the unit." After this Local 28 field men installed the units at the jobsite. CDE tested and approved the installed units. But Essex did not give a warranty or guarantee "involving the installation." However, it never received any complaints as to the operation of functioning of said installed units.

On cross McKeogh asserted that the Staten Island job was the only occasion on which Essex "performed any work in relation to the Carrier Moduline units."

Edward Stack, president of Local 28 since July 1974, was another witness for Respondent. An adequate condensation of his testimony follows. He was a business agent for Local 28 for slightly more than 7 years prior to becoming its president. In July 1974, Contardi of Carrier requested Stack "to implement the agreement between Local 28 and Carrier . . . regarding the . . . rise of the Moduline unit in the City of New York," said agreement having been mailed about March 12 to President Pasquinucci of Local 28. Stack promised "to review it." When Contardi telephoned Stack a few days later, Stack informed him that Local 28 "remained consistent with its agreement." Said agreement was between Local 28 and the Sheet Metal Contractors Association as well as some independent sheet metal companies.

At this point Respondent rested.

C. *General Counsel's Rebuttal*

Augustus Contardi's testimony as a rebuttal witness is briefly set forth here. He visited the completed Bache & Co. job at Pearl and Gold Streets in Manhattan, New York City, already mentioned above by other witnesses, on March 14, 1975. Carrier did not sell Moduline 37A or 37P units for said Bache & Co. job. Further there are no variaable volume units on said job, regardless of whether Carrier or anyone else manufactured them.

At this point both parties rested except for the right to introduce further evidence on an incident which occurred at a job during the hearing. The case was continued for this limited purpose to April 15, 1975.

D. *The Resumed Hearing on April 15, 1975*

At the hearing on April 15, 1975, the parties entered into the following written stipulation. (G.C. Exh. 20.) Immediately after the meeting of the Joint Adjustment Board on March 7, 1975, Morris Lipka, president of General Sheet Metal Works, Inc., instructed members of Local 28 to cease, and they did cease, installing Carrier Moduline units on the Babies Hospital Addition job. On or about March 17, 1975, Lipka met with President Stack of Local 28, and advised Stack that General Sheet would pay $2,153.60 to the Local 28 sick dues relief fund as set out in said Local's proposed resolution as found in General Counsel's Exhibit 2, appendix BB. (Said proposed resolution accused General Sheet of "permitting work covered by our Agreement—fabrication of plenums—involving the Carrier Dual Modu-

line unit for installation at the Presbyterian Medical Center, Babies Hospital . . . to be performed by persons who are not within the bargaining unit covered by our agreement . . . Resolved that General Sheet . . . make payment of the sum of $2153.60 to the Local 28 sick dues relief fund, representing the loss of hours caused by General's said violation . . . 160 hours at the rate of $13.46 per hour.")

Said stipulation further provides that Stack told Lipka that said charges would be settled; that General Sheet paid said $2,153.60 about March 20 and resumed installation of said units; and that about March 21 Stack wrote to General Sheet a letter confirming the terms of the above settlement. Said letter is attached to the stipulation.

In addition, Augustus Contardi testified substantially as follows for Carrier, the Charging Party herein. About March 14, 1975, Ed Simek of Colonial Mechanical, accompanied by Morris Lipka of General Sheet, met with Contardi to discuss the fact that General Sheet had stopped working on the Babies Hospital job. Lipka stated he had stopped the working on said job because General Sheet had been brought up on charges and was subject to a fine. Simek stated he "could not tolerate the pressure." Consequently, Contardi stated to Lipka to settle the charges with Local 28 and Carrier would reimburse General Sheet for the amount assessed by Local 28 on such charges. Carrier did later so reimburse General Sheet. (Charging Party's Exh. 1 and 2 for General Sheet's request for such reimbursement.)

IV. CONCLUDING FINDINGS AND DISCUSSION

In arriving at the findings set forth below I have observed the following applicable principles of law: (a) the burden of proof is upon the General Counsel to establish his case, and this obligation remains with him during the entire hearing. A corrollary is that no burden is imposed upon Respondent to disprove any of the allegations pleaded in the complaint. (b) Failure of the Respondent to establish any one or more of its defenses does not amount to affirmative evidence aiding the General Counsel in proving his case. (c) As hereafter recited, I have not credited Respondent's evidence on some aspects of the case. But this does not contribute to the General Counsel's burden of proving his case. *N.L.R.B.* v. *Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 246 (C.A. 9, 1969); *Ri-Del Tool Mfg. Co., Inc.*, 199 NLRB 969, 973 (1972). "The mere disbelief of testimony establishes nothing." *N.L.R.B.* v. *Joseph Antell, Inc.*, 358 F.2d 880, 883 (C.A. 1, 1966).

A. *The Collective-Bargaining Agreements Between Local 28 and Three Boro and Sheet Metal Air Conditioning Contractors Association*

I find that Three Boro and the association each has a collective-bargaining agreement with Local 28 which contains a no-subcontracting clause which contravenes Section 8(e) of the Act. This is because I find not only that said clause (G.C. Exh. 2, app. E, p. 40) on its face contravenes Section 8(e) of the Act, but also because Pasquinucci as president of Local 28 told Contardi of Carrier that Carrier could not bring its Moduline unit into the New York City area until they had some kind of understanding.

Even after a committee of Local 28 unanimously recommended that Carrier's Moduline unit be accepted in the New York area because such units would create more work for members of Local 28, such recommendation was turned down by both the executive board and the membership of Local 28. As Pasquinucci credibly testified on this phase of the case, the executive board of Local 28 was not willing to modify the collective-bargaining agreements of Local 28 in relation to the fabrication of plenums.

In this connection I find, crediting Contardi, that President Farrell of Local 28 stated that Carrier's units manufactured in Tyler, Texas, "could not come into New York" unless the plenum section thereof was manufactured in New York in a shop which had a collective-bargaining agreement with Local 28. And I also find that Carrier was also "brought up on charges within" the Mechanical Contractors Association, to which it belonged. Later still Farrell objected to Carrier's Moduline unit being installed on the New York police office building job because the plenum for such unit was being fabricated in Tyler, Texas.

Also, Dan Pasquinucci, as president of Local 28, admitted to Contardi that, on the Van Etten Drug Treatment Center job he, Pasquinucci, had refused to let members of Local 28 "sketch the job" and "would not permit this unit [i.e., Carrier's Moduline unit] to come into New York." Yet the owner of said building had decided to install Carrier's Moduline unit at said treatment center and his architect had so provided in the specifications submitted to contractors who bid on it. Three Boro was the air-conditioning subcontractor on said job, but its sketch-

er, Johansmeyer, a member of Local 28, erased from the blueprints the use of Carrier Moduline units. When Contardi complained of this to Pasquinucci the latter stated that he would not permit this unit to come into New York. I find no right of control by Three Boro over the type of unit or its composition to be used on this Van Etten job.

Another instance of a violation of Section 8(e) of the Act is the Babies Addition to the Columbia Presbyterian Hospital. Here again I find no right of control in the subcontractor, General Sheet Metal, Inc., so that Local 28, with whom it had a contract as a member of the association, had no lawful right to insist that General fabricate the plenums, especially since the building owner's specifications called for an installation of Carrier's Moduline units. And I further find, as contended by the General Counsel, that such specifications "contemplated that the work of fabricating such plenums would not be done by sheet metal contractors."

Also, I find that the charges filed by Local 28 against General with the Joint Adjustment Board cannot be upheld by Section 8(e) of the Act, since the provisions in the collective-bargaining contract between Local 28 and the Association forbidding subcontracts allowing plenums to be fabricated outside of New York are not lawful. Cf. *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In said *Connell* case, the Supreme Court held, "We conclude that Section 8(e) does not allow this type of agreement."

In this connection I find that said clauses in the contracts of Local 28 were not to preserve work for

its members but their tactical object was to obtain benefits, i.e., fabricating plenums, for members of Local 28 which were being enjoyed by Carrier's employees in Tyler, Texas. See *National Woodwork Manufacturers Association et al.* v. *N.L.R.B.*, 386 U.S. 612, 644, 645 (1967).

Moreover, I find that the Carrier Moduline unit is a new and different product and that fabrication and installation of these special units is not work traditionally and historically performed by on-site sheet metal workers belonging to Local 28. And I further find that Local 28, by applying the aforesaid work preservation clause, "was trying to acquire work performed by employees" of Carrier in Tyler, Texas. See *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (C.A. 9, 1975). And I find that Local 28 used coercion to attain said objective, said coercion being not only the refusal of its members to install said units but also the filing of charges by Local 28 against employers signatory to contracts with it. One of such charges resulted in one employer's, General Sheet, paying $2,153.60 to the Local 28 sick dues relief fund.

As the Ninth Circuit Court of Appeals pointed out in the above *AGC* case, "Inevitably, no subcontractor who is bound by a provision of the type involved here will install prefabricated [products] unless he has an agreement that he will be reimbursed for assessments and other sanctions levied against him. This practice will influence the business decisions of hospital builders." 514 F.2d at 439. This language is equally applicable to the hospital builders in the instant case, and I so find. And I further find that

the construction industry proviso to Section 8(e) of the Act is not applicable because "the disputed work," i.e., the plenums, "was done off the jobsite at the plant of [Carrier] in another State." See 514 F.2d at 439. In my opinion, I consider distinguishable and, therefore, not requiring a contrary conclusion, the recent case of *United Brotherhood of Carpenters & Joiners of America, Local 112, AFL-CIO, and Its Agent, Southwest Building Trades Council (Summit Valley Industries, Inc.)*, 217 NLRB No. 129 (1975).

Crediting the General Counsel's evidence, and not crediting Respondent's evidence to the extent it is not consonant with the General Counsel's, I find that pursuant to an agreement between Local 28 and Carrier applicable to the police office building job, the work of fabricating plenums for Carrier's Moduline units for said job was given to Triangle, which employed members of Local 28. But Triangle did not prepare said plenums properly, so that Carrier, having guaranteed the entire unit, suffered about $10,000 in additional costs to render the units properly workable. As noted above, I have found the pertinent clause in the Local 28 collective-bargaining contract violative of Section 8(e) of the Act. However, assuming such clause not unlawful as worded, I find that under the circumstances, i.e., the inability of Triangle and other subcontractors such as Essex Metal Works, to fabricate a workable plenum demonstrates that Carrier was unable to obtain any orders for Moduline units if plenums therefore were to be fabricated separately by others than Carrier. Indeed a Local 28 committee so found in a report it submitted to said union. (G.C. Exh. 2, app. I.) And

the testimony of Larry Sturgis, which I credit, concurs in said committee's report.

Further, I find that the Local 28 executive board on May 30 and June 5, 1973 (GC. Exh. 6), voted that "no allowance in [collective-bargaining agreements] be made to allow the dual Moduline Mixing Box in the New York City area." This also depicts coercion on the part of Local 28, assuming that coercion must be shown to demonstrate that the subcontract clause is invalid under Section 8(e) of the Act. Of course this occurred more than 6 months before the late charge against Local 28 was filed, so that it cannot be found to constitute an unfair labor practice. But it demonstrates that Local 28 was doing more than merely preserving work, as it shows that it was compelling Carrier, a Tyler, Texas, manufacturer, to produce its Moduline units without a plenum.

It is also of some, but not conclusive, significance that the entire Moduline unit, including its plenum, is not only manufactured in Tyler, Texas, but also that several patents cover the separate parts which compose the unit. It would seem that Carrier's right to fabricate the entire unit is assured by said patents, and that the efforts of Local 28 to cause Carrier to surrender such patent protection to others with whom Local 28 has a collective-bargaining agreement is not a right conferred upon Local 28 by the National Labor Relations Act. Cf. the Supreme Court's decision in the *Connell Construction Company* case, *supra* where it was held that the said labor relations Act does not authorize unions to violate the Federal antitrust laws.

Further, I find that, on the evidence which I credit, some of which is set out in the Local 28 committee's report, Local 28 members will not lose any work if Carrier continues to manufacture the plenums for its Moduline units. And the record fails to disclose that Local 28 members have traditionally or historically fabricated these Carrier plenums over an extended period of time in the past. The two times when Local 28 members produced Carrier's plenum not only fail to rise to the stature of tradition or history but also arose only because Carrier consented thereto as an effort to settle the dispute with Local 28.

B. *The 8(b)(4) Violations*

1. As to Section 8(b)(4)(i)(B)

This subsection, so far as material herein, forbids a labor organization from inducing an employee to refuse to perform services for his employer where an object thereof is to force or require any person to cease doing business with any other person. I find that the Respondent has violated this subsection.

In this connection I find, crediting Contardi, that Dan Pasquinucci, the president of Local 28, admitted to Contardi in October, 1973, that Dan "had refused to let [Local 28 members] sketch the [Van Etten] job" and that Dan "will not permit this [Moduline] unit to come to New York." I find that Pasquinucci's conduct constitutes inducement or encouragement of employees where an object thereof is to have contractors refuse to do business with Carrier, i.e., contractors would be unable to use Carrier's Moduline unit. And I further find that this violates Section 8(b)

(4)(i)(B) of the Act. One of the employees so induced was Ted Johansmeyer, a member of Local 28 and a sketcher for Three Boro on the Van Etten Drug Treatment Center job.

Further, I find that the executive board of Local 28 made a decision to refuse Local 28 members the right to install Carrier's Moduline units (G.C. Exh. 5) and that this decision was adopted by the membership of Local 28. This amounts to inducement or encouragement, and I so find, and I further find that an object thereof is to force or require contractors not to do business with Carrier by purchasing or using Carrier's Moduline units.

2. As to Section 8(b)(4)(ii)(B)

In essence this part of the Act prohibits a union from threatening, coercing, or restraining any employer where an object thereof is to force or require any employer to cease doing business with any other employer. I find that Respondent did engage in conduct, set forth below, which violated this subsection of the Act.

a. Crediting Contardi, and not crediting Dan Pasquinucci, I find that the latter informed Contardi in October 1973, that Pasquinucci had refused to allow Local 28 members to sketch the Van Etten Drug Treatment Center job and that he would not permit Carrier Moduline units to come into New York. This, I find, constitutes coercion, an object of which is to force or require Three Boro to cease doing business with Carrier. The architect and the engineer on this job had decided "to put Moduline on the job," and Three Boro as the sheet metal contractor was to install Moduline units.

b. In November 1973, Dan Pasquinucci told Contradi that Dan insisted that he "could not permit the [Moduline] unit to come in" to New York. This, too, contravenes the subsection of the Act which is discussed at this point.

c. In July 1974, President Stack of Local 28 informed Contardi that said Union "was going to insist that [Carrier] go along with the agreement as written," i.e., "Local 28's agreement with the Association." It is my opinion, and I find, that Stack's statement is coercive and is intended to force Carrier to change its methods of manufacturing Moduline units by not making plenums for its Moduline units. It is coercive as to Three Boro and other employers in the Association. I find that such statement contravenes the subsection of the Act here under consideration.

d. Finally, I find that it is not necessary that a complete cessation of business dealings occur to find a violation. It is sufficient that Respondent's conduct causes Carrier to alter its Moduline units by delivering them without plenums. Thus, I find that Respondent interfered with Carrier's process of delivering complete Moduline units and prevented contractors doing business with Carrier from obtaining such complete units. Cf. *Retail Clerks Union, Local 770, AFL-CIO, and Retail Clerks International Association AFL-CIO*, 145 NLRB 307, 311-312 (1963). And see *Retail Clerks Union, Local 1428*, 155 NLRB 656, 659-660 (1965); *Local Union No. 26, Sheet Metal Workers Association, AFL-CIO, and Sheet Metal Workers International Association, AFL-CIO*, 168 NLRB 893, 895, 899-900 (1967).

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of Respondent set forth in section IV, above, found to constitute unfair labor practices, occurring in connection with the operations of Carrier described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices it will be recommended that it cease and desist therefrom and that it take certain affirmative action, described below, designed to effectuate the policies of the Act.

On the record as unfolded at the hearing, I am unable to find that Respondent has demonstrated any general hostility to the Act. Accordingly I find that an Order prohibiting Respondent from committing the conduct herein found to contravene Section 8(e) and 8(b)(4)(i) and (ii)(B) of the Act will effectuate the policies of the Act, and that an Order broader in scope is not warranted. Cf. the Board's Order in *Sheet Metal Workers International Association Local No. 150*, 170 NLRB 772, 774 (1968).

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. Respondent Local 28 is a labor organization within the meaning of Section 2(5) of the Act.

2. Carrier and the other employers involved in this case are employers within the meaning of Section 2(2) of the Act. Carrier is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By its conduct in enforcing articles 4(b) and 16 of the collective-bargaining contract between Local 28 and Three Boro and similar clauses in the collective-bargaining contract between Local 28 and the Association, Local 28 has engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

4. By coercively refusing to allow employers with whom Local 28 has collective-bargaining contracts in the New York City area to install Moduline units unless said units lacked Carrier's plenums. Local 28 engaged in unfair labor practices within the meaning of Section 8(b)(ii)(B) of the Act.

5. By Pasquinucci's refusing to allow Local 28 members to sketch the Van Etten job and his not permitting Carrier's Moduline unit to come to New York City, and by the Local 28 executive board's decision to refuse to allow said units to be installed in the New York City area, said decision being adopted by the membership of said Local 28, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(i)(B) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

No. 76-1437

In the Supreme Court of the United States

OCTOBER TERM, 1976

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, PETITIONER

v.

CARRIER AIR CONDITIONING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-30a) is reported at 547 F. 2d 1178. The opinion of the National Labor Relations Board (Pet. App. 31a-44a) is reported at 222 NLRB 727. The recommended decision of the Administrative Law Judge (Carrier Br. in Opp. App. 1a-42a) is reported at 222 NLRB 731.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The petition for a writ of certiorari was filed on April 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals should have remanded this case to the Board to allow the Board to determine, in the first instance, whether the collective bargaining agreement provisions involved here had a primary work preservation purpose.

2. Whether a union may enforce a no-subcontracting clause by referring disputes to arbitration and by asking for compensation for breach of that clause.

STATEMENT

1. The collective bargaining agreement between petitioner Sheet Metal Workers' International Association, Local 28, AFL-CIO ("the Union") and the Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., contains a no-subcontracting clause (Pet. App. 6a n. 3). The Union invoked this clause to bar the installation of Carrier Air Conditioning Company's "Moduline" air conditioning units, which contained prefabricated plenums.

Carrier argued that the clause operated as a prohibited secondary agreement. The Board's Administrative Law Judge found that the application of the no-subcontracting clause to the Moduline units violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), which prohibits "hot cargo" or secondary agreements (Carrier Br. in Opp. App. 32a-38a). He concluded that attaching the plenums to those units was "new" work rather than work traditionally performed by the employees covered by the contract, and hence the Union's objective was work acquisition rather than work preservation (*id.* at 34a-36a).[1]

[1]The Administrative Law Judge also relied on the fact that the Association lacked the "right to control" the use of the Moduline units (Carrier Br. in Opp. App. 34a).

He also found that the Union violated Section 8(b)(4)(i)(B) of the Act, 29 U.S.C. 158(b)(4)(i)(B), by inducing employees to refuse to perform services, and Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B), by restraining and coercing employees, in furtherance of the Union's unlawful secondary objective (Carrier Br. in Opp. App. 38a-40a).

The Board dismissed the unfair labor practice complaint in its entirety (Pet. App. 31a(1)-44a).[2]

The Board found that Carrier had not established a threshold requirement—the Union's use of illegal inducement or coercion. It therefore did not consider whether the Union had an unlawful secondary objective. The Board found that the Union had not engaged in the inducement or encouragement proscribed by Section 8(b)(4)(i)(B) by presenting to its membership a resolution recommending that the no-subcontracting clause not be waived for Carrier plenums, or by the action of one union member in erasing Carrier units from the sketches for one project (Pet. App. 40a(2)-41a(1), 42a(1), 43a(1)). The Board further found that the Union had not engaged in restraint or coercion, within the meaning of Section 8(b)(4)(ii)(B), or violated Section 8(e), by telling Carrier representatives that Moduline units would not be allowed into New York City, or by invoking the contractual grievance procedure against a subcontractor that installed Moduline units.[3] The Board found that the

[2]The petition contains several pages bearing the same page number. We have designated the first page 31a as 31a(1), the second page 31a as 31a(2), and so on.

[3]Rule XIX of the contract provides that the penalty for the first violation of the agreement shall be censure, and that for subsequent violations a fine shall be imposed commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeymen sheet metal workers by reason of such violation (Pet. App. 34a(2)-35a(1)). The Joint Adjustment Board consists of an equal number of representatives of the Union and of the Employer Association (Pet. App. 40a(2) n. 6).

"statements were no more than reiteration of [the Union's] position that it would not relinquish its rights under the collective bargaining agreement" (Pet. App. 41a(1)-41a(2)), and that the situation as a whole came within the rule of *Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California)*, 207 NLRB 698, 700,[4] that a "contractual agreement * * * for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute," and thus does "not constitute statutorily proscribed threats, coercion, or restraint" (Pet. App. 42a(1)). Because the Board concluded that the resort to contractual grievance machinery did not amount to threats or coercion, it "[found] it unnecessary to reach the primary-secondary employer and work preservation issues on which the Administrative Law Judge passed" (*id.* at 43a(2); see also *id.* at 41a(2) n. 8).

2. The court of appeals agreed with the Board that the Union had not violated Section 8(b)(4)(i)(B) of the Act (Pet. App. 22a, 27a, 24a),[5] but it disagreed with the Board's application of Section 8(b)(4)(ii)(B) and Section 8(e) to this case (*id.* at 12a-29a). The court, reaching an issue pretermitted by the Board, held that the no-subcontracting clause, as applied by the Union to the fabrication and installation of plenums on Carrier Moduline units, had a work acquisition objective that was secondary and

[4]Reversed *sub nom. Associated General Contractors of California* v. *National Labor Relations Board*, 514 F. 2d 433 (C.A. 9).

[5]Pet. App. 23a and 27a are printed out of order. Page 23a should be substituted for page 27a, and *vice versa*.

proscribed by Section 8(e);[6] the court reasoned that the fabrication and installation of the Moduline plenums was new work, not work traditionally performed by the employees covered by the contract (Pet. App. 12a-19a).[7]

The court further concluded that the Union's warnings that the Moduline units would not be allowed into New York City, and its invocation of the contractual enforcement mechanism, constituted threats, coercion, or restraint for a secondary purpose and consequently were prohibited by Section 8(b)(4)(ii)(B) (Pet. App. 23a-26a, 28a-29a). Although it acknowledged that resort to the courts for enforcement of a contract provision is not the sort of coercion that Congress intended to make unlawful, the court held that resort to the contract enforcement procedures here was coercive because the grievance and

[6]The court held that the Section 8(e) charge was not barred by the six-month limitations period of Section 10(b) of the Act, 29 U.S.C. 160(b), finding, contrary to the Board (Pet. App. 42a(2) n. 10), that the Union and the Association had, within the six-month period, reaffirmed the applicability of the no-subcontracting clause to the Carrier Moduline units (Pet. App. 14a-16a and n. 8).

[7]The court rejected the Board's contention that a remand was required (Pet. App. 17a n. 9). The court found that "the Board did reach the [work preservation and secondary activity] questions, albeit implicitly, and that in any event * * * a remand would serve no purpose" (*ibid.*). The court added: "The ALJ's findings of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation, which he found more than sufficient for §8(e) purposes, a conclusion with which we agree" (*ibid.*).

The court also observed that "[b]ecause we find ample direct evidence of the no-subcontracting clause's secondary purpose, unrelated to work preservation, we need not consider whether such a purpose may be inferred on the basis that the Association members lacked the 'right to control' the work sought by the Union" (Pet. App. 19a n. 12). See note 1, *supra*, and *National Labor Relations Board* v. *Enterprise Association*, No. 75-777, decided February 22, 1977.

arbitration provisions were not judicial and lacked the "factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute" (Pet. App. 28a).[8] The court remanded the case to the Board "for proceedings not inconsistent with this opinion" (Pet. App. 29a).

Judge Smith agreed with the majority that the Board erred in finding lack of coercion. He, however, would have remanded the case to the Board to allow it to consider whether the Union's objective was work preservation or work acquisition (Pet. App. 29a-30a).

DISCUSSION

The Board does not agree with the court of appeals' disposition of this case. It believes that the court of appeals should have remanded the case to the Board to allow the Board to decide, in the first instance, whether the activity in question was "work acquisition" rather than "work preservation." The difference is important (cf. *National Labor Relations Board* v. *Enterprise Association*, No. 75-777, decided February 22, 1977, slip op. 22 n. 16), and the task of drawing inferences from the facts in each case is for the Board rather than for the courts. The court of appeals therefore should not have passed upon this question, or upon the question whether the Union's object was primary or secondary, without receiving the views of the Board. *South Prairie Construction Co.* v. *Local No. 627, Operating Engineers*, 425 U.S. 800, 805-806; *National Labor Relations Board* v. *Food Store Employees*, 417 U.S. 1, 9.

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[8] The court added: "We need not decide whether resort to bona fide arbitration procedures would constitute unlawful coercion" (Pet. App. 27a).

The Board also believes that the resort to contractual grievance machinery is not the sort of pressure or coercion prohibited by Sections 8(b)(4)(ii)(B) and 8(e) of the Act, and that the court of appeals erred in reaching a contrary conclusion. The Union activity at issue here was, the Board concluded, permissible whether or not it had a prohibited secondary objective. See H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959).

Nevertheless, the Board did not file a petition for a writ of certiorari because the court of appeals' decision turns essentially upon an evaluation of the peculiar circumstances of this case. The Board does not believe that the court of appeals' decision will have an impact on a substantial number of other cases. In the absence of a conflict among the circuits on the question presented here, review by this Court is not necessary.[9] If the Court grants the Union's petition for a writ

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[9] Contrary to petitioner's suggestion (Pet. 19-21), the legal standard applied by the Second Circuit here is compatible with that applied by the Board and the District of Columbia Circuit in evaluating work preservation issues under *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612. The courts agree that Section 8(e) permits contract provisions aimed at the protection of work traditionally performed by unit employees and proscribes contract provisions designed to acquire work not traditionally performed by them. Compare Pet. App. 18a-19a with *Plumbers and Steamfitters, Local Union 342 (Conduit Fabricators)*, 225 NLRB No. 195; *Building Material & Construction Teamsters* v. *National Labor Relations Board*, 520 F. 2d 172, 178-179 (C.A. D.C.). See also *National Labor Relations Board* v. *Enterprise Association*, *supra*, slip op. 22 n. 16.

Petitioner contends (Pet. 25-26) that the court of appeals' decision conflicts with *George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F. 2d 323, 327 (C.A. 4). But *Koch*, like *Enterprise Association*, involved the Board's "right to control" doctrine. The court in *Koch* enforced a Board order finding secondary activity, and it had no occasion to consider whether resort to contractual grievance procedures constituted the pressure or coercion forbidden by the Act when pursued with a secondary objective.

of certiorari, however, the Board is prepared to defend its decision on the merits.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

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